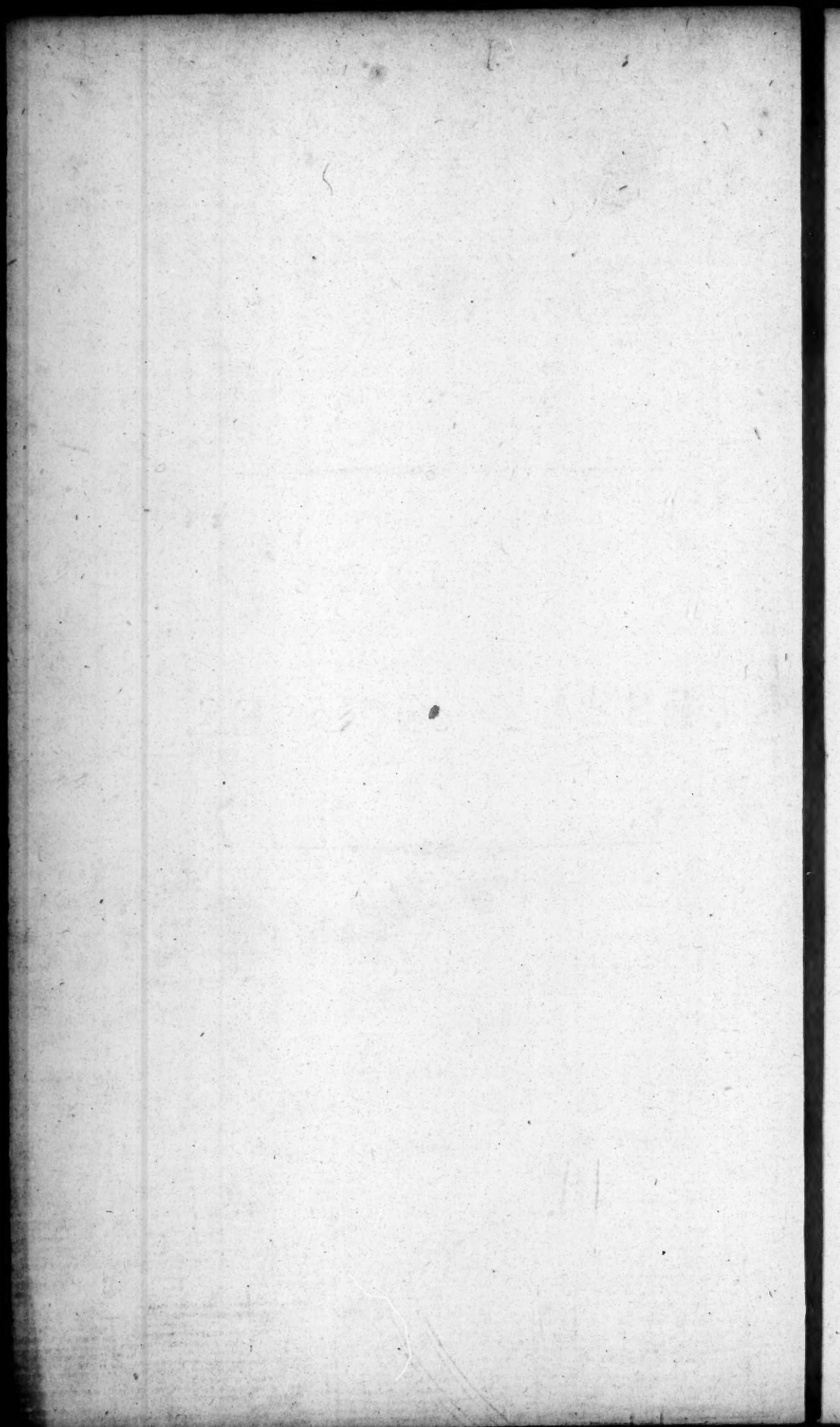


Feb 1

C R U I S E ' s

ESSAY ON USES.



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E S S A Y

O N

U S E S.

By WILLIAM CRUISE, Esq;

OF LINCOLN'S-INN, BARRISTER AT LAW,

AUTHOR OF THE ESSAY ON FINES AND RECOVERIES.

8°
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P R E F A C E.

THE doctrine of Uses being, in fact, the foundation and theory of modern CONVEYANCING, the following Essay, which was written some years ago, with a view of reducing into a small compass the leading principles on that Subject, is submitted to the Profession.

THE Author trusts to that indulgence which he has already experienced, for any errors, into which he may have fallen, in treating so concisely a branch of the Law, of which some parts are certainly of a very abstruse nature.

Lincoln's Inn,
8th Nov. 1795.

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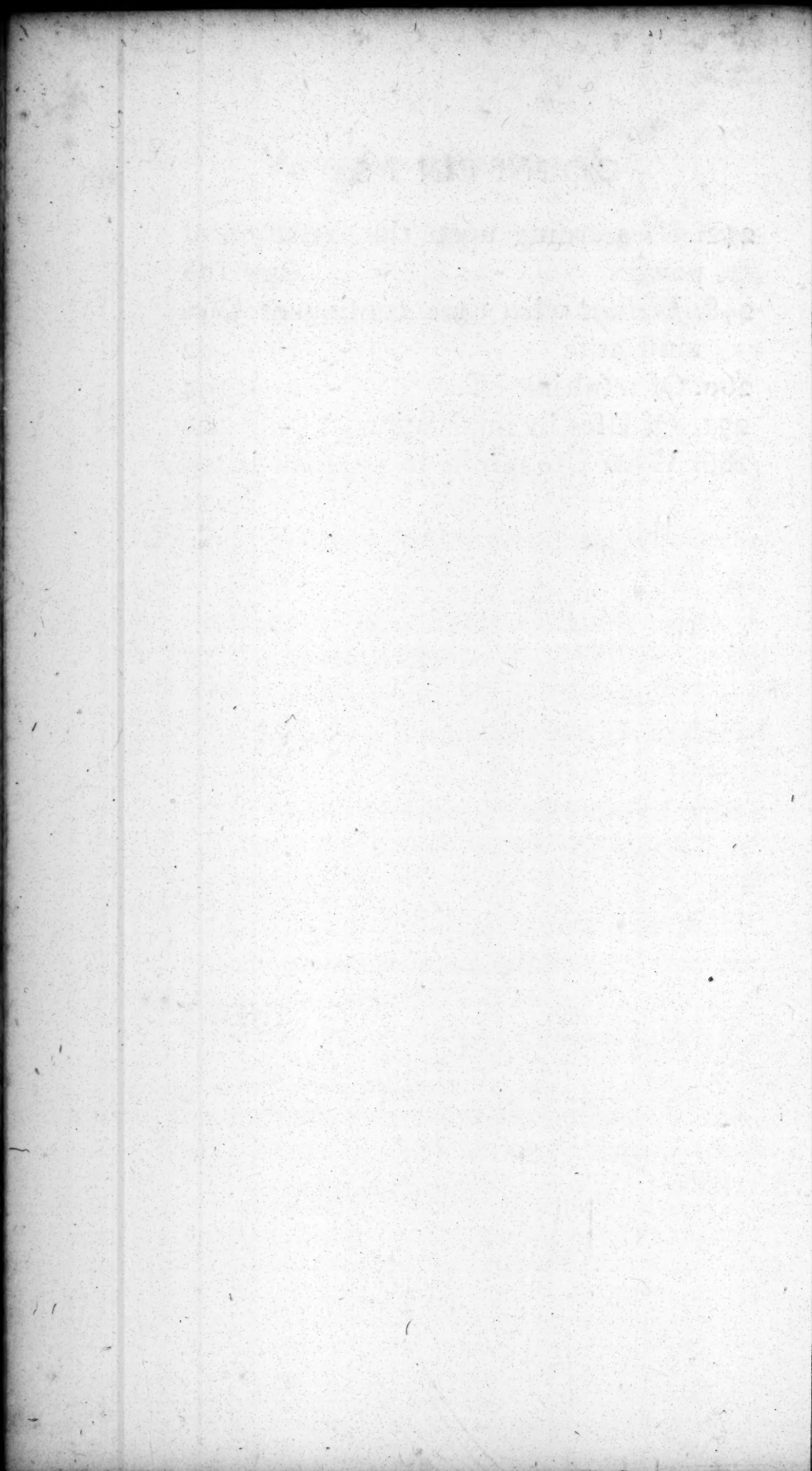
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U S E S.

CHAPTER I.

Of the Origin of Uses.

1. **T**HE original simplicity of the common law admitted of no immediate estate in lands, which was not clothed with the legal seisin and possession thereof. But in process of time, a right to the rents and profits of lands whereof another person had the legal seisin and possession was introduced, and though not recognized for a long time by the courts of common law, was notwithstanding supported by the court of chancery, and became well known by the name of a Use. *Origin of Uses.*

The introduction of this novelty has been attended with the most serious

B

con-

consequences, and though at first it appears to have been but a trivial innovation, yet in its progress it has in fact produced a revolution in the system of real property, and introduced a mode of transferring land very different from that which the old law had originally established.

2. A Use was created in the following manner.—The owner of lands conveyed them by feoffment, with livery of seisin to some friend, with a secret agreement that the feoffee should be seised of the lands to the use of the feoffor, or of a third person. Thus the legal seisin was in one, and the use, or right to the rents and profits was in another.

Vide
Reeves's
Hist. of
the Law,
vol. 3.
174.

3. It would be a matter of considerable difficulty to ascertain the precise time when this distinction between the legal seisin, and the right to the rents and profits was first introduced. It is however certain that the practice of conveying lands to one person, to the use of another, did not become general until the

the reign of *Edward* 3. when the ecclesiasticks adopted it, in order to evade the statutes of Mortmain, by procuring conveyances of land to be made, not directly to themselves, but to some lay persons, with a secret agreement, that these lay persons should hold the lands for the use of the ecclesiasticks, and permit them to take the rents and profits.

Bac. Read.
on Uses,
Edit.
1785. p.
22. 1 Rep.
123. a.

4. The idea of a use, and the rules by which it was first regulated, are now generally admitted to have been borrowed by the ecclesiasticks from the *fidei-commisum* of the civil law. It will therefore be necessary to give some account of that subject,

Of the
*fidei com-
missum.*
Bac. Read.
19.

By the Roman law a great number of persons were incapable of being constituted heirs, or even of taking a legacy under the testament of a Roman citizen; such as exiles, unmarried persons, those who had no children, &c. in order to evade this law; it became usual for testators to constitute some

Vinnius
ad Inst.
lib. 2. tit.
23. f. 1.

person their heir who was capable of inheriting, and to annex a request to the devise, that the person thus constituted heir, should give the inheritance to some other person who was incapable of taking under the will.—*Quibus enim non*
Just. Inst. lib. 2. tit. 23. f. 1. *poterant hæreditatem vel legata relinquere, si relinquebant, fidei committebant eorum, qui capere ex testamento poterant hæreditatem.*

This was called a *fidei-commissum* of which *Justinian*, in his *Institute*, has preserved the form. *Cum igitur aliquis*
Idem f. 2. *scripserit Lucius Titius hæres esto, potest adjicere, rogo te Luci Titi, ut cum primum poteris hæreditatem meam adere, eam Caio Seio reddas restituas.*—The person thus constituted heir was called *hæres fiduciarius*, and the person to whom the testator directed the inheritance to be given, was called *hæres fidei-commissarius*.

5. In cases of this kind the *hæres fidei-commissarius* had only what the Roman lawyers called a *jus precarium*, that is
 a right

a right in curtesy, for which the remedy was only by entreaty or request, so that the *haeres fiduciarius* was under no legal obligation of complying with the directions of the testator,—*et ideo fidei-commissa appellata sunt, quia nullo vinculo juris, sed tantum pudore eorum qui rogabantur, continebantur.* Just. Inst.
lib. 2. tit.
23. 1. 1.

6. Thus stood the Roman law, respecting the *fidei-commissum* for some centuries; during which time several frauds were committed by those who being constituted heirs, with a direction to give the inheritance to some other person, refused to execute the trust reposed in them by the testator, and converted the property to their own use. But *Augustus* having been constituted heir in the testament of *Lucius Lentulus*, with a request to give the inheritance to the daughter of the testator, he consulted all the eminent lawyers at *Rome*, and in pursuance of their advice, executed the trust as the testator had directed.—*Nam cum (L. Lentulus) decederet in Africa, scripsit codicillos* Cicero de
Finibus
lib. 2.

Just. Inst. *dicillos testamento confirmatos, quibus ab*
 lib. 2. tit. *Augusto petiit per fidei-commissum ut faceret*
 25. Pro- *aliquid, et cum D. Augustus voluntatem*
 em. *ejus impleisset; deinceps reliqui ejus auctori-*
tatem sequuti, fidei-commissa præstabant:
et filia Lentuli legata, que jure non debebat,
solvit.

7. It is natural to suppose that this example would have a considerable influence over those who afterwards happened to be in the same situation. *Augustus* however proceeded a step farther, and directed the consuls to take cognizance of all future cases of this kind. *Jussit consilibus auctoritatem suam interponere.* As the practice of treating *fidei-commissa* increased under the Emperors, *Claudian* appointed two magistrates for the sole purpose of determining cases of this kind who were thence called *prætores fidei-commissarii*.

Just. lib. 8. *Justinian* completed this system,
 2. tit. 23. and extended the rights of the *hæres*
 f. 12. *fidei-commissarius*, by a law which enacted,

ed, that if a testator should direct his heir to give, either the whole, or part of the inheritance to another, and this circumstance could not be proved either by the written will of the testator, or the testimony of five witnesses, in case the heir should refuse to comply with the intention of the testator, he was compellable either to take a solemn oath, that the testator had not created any *fidei-commissum*, or else to execute the trust reposed in him.

9. Upon the first introduction of Uses, ^{*Jurisdiction assumed*} the person to whom a use was limited, ^{*by the*} who was called the *cestui que use*, was ^{*chancellers*} exactly in the same situation with the ^{*over uses.*} *hæres fidei-commisarius*, and depended entirely on the good faith of the feoffees to uses, or the persons to whom the lands were conveyed. And it is natural to suppose, that while the rights of the *cestui que use*, were so extremely precarious, and depended so entirely on the good faith of the feoffee to uses, many breaches of trust were committed, nor
is

is it improbable but that even the ecclesiasticks who introduced this species of property, became in some instances the dupes of those to whom lands had been conveyed for their use. This induced the clerical chancellors of those times to consider the limitation of a Use, as similar to a *fidei-commissum*, and binding in conscience; they therefore assumed the jurisdiction which *Augustus* had given to the Roman consuls, of compelling the execution of Uses in the court of chancery.

10. It however soon appeared that even this assumed jurisdiction was not sufficient to answer their purposes, for whenever a positive declaration of a use, could not be proved, which must frequently have happened, when uses were declared in a secret manner, by words only without writing, the court of chancery could not compel the feoffee to execute the uses, there being no legal proof that he held the lands to the use of any other person.

11. To

11. To remedy this inconvenience *Invention of the writ of subpœna.*
John Waltham bishop of *Salisbury*, and chancellor to king *Richard II.* took advantage of the privilege given him by the statute of *Westminster* 2. 13 *Ed. I. c. 52.*
 34. of devising new writs, and invented the writ of *subpœna*, returnable only in the court of chancery.

The writ of *subpœna* was originally a process in the courts of common law, to enforce the attendance of a witness to give evidence ; but this new writ of *subpœna* was used in the court of chancery, for the same purpose as a citation in the courts of civil and canon law, to compel the appearance of a defendant, and to oblige him to answer upon oath, the allegations of the plaintiff, contrary to one of the first principles of the common law, that no man can be compelled to criminate himself.

12. In the history of the English law ^{3 Reeve}
 it is suggested that the writ of *subpœna* ^{19.}
 was not originally invented by the
 bishop

bishop of *Salisbury*, but only adopted in his court ; as it was a process which had been long before used by the council, and against which a formal complaint had already been made by the Commons which is to be found in the rolls of parliament,

Rot. Parl.
vol. 2. p.
295.

13. It is well known how extremely averse the nation always was to any alteration of the common law, and that they were particularly jealous of every maxim or rule, taken from the civilians or canonists, which was attempted to be introduced or substituted in the room of the common law. Accordingly we find that this innovation did not pass unnoticed, for early in the next reign, viz. in 2 *Hen.* 4. the commons took notice of the introduction of the writ of *subpœna*, and presented a strong petition to the king against it, praying that, that species of process might be abolished ; to which *Henry* 4. who was not yet firmly settled on the throne, gave a palliating answer.

Rot. Parl.
vol. 3. p.
471.

14. Another

14. Another petition was presented to *Hen. 5.* by the commons, complaining of the hardships to which all persons were become liable from the introduction of this new writ of *subpæna*, observing that it was a novelty against the form of the common law, which *John Waltham* late bishop of *Salisbury* out of his subtlety found out and began, by which persons were compelled to answer upon oath, pursuant to the form of the civil law, and the law of the holy church, praying that those who sued out such a writ, should insert all their allegations, and if any person was aggrieved by a writ of this kind in any matter which was determinable at common law, that he should be paid the sum of 40*l.*

Rot. Parl.
vol. 4. p.
84.

To this petition the king returned for answer *Le Roi s'avisera*, by which means the writ of *subpæna* was firmly established, and was thenceforth constantly used for the purpose of compelling all persons to declare on oath, whether they held

held particular lands to their own use, or to the use of any other persons.

15. From this account of the progress of Uses, it evidently appears that the ecclesiastical chancellors adopted the principles of the civil law in the construction of them, and that the bishop of *Salisbury* derived the idea of the *subpæna* returnable in chancery from that law of *Justinian*, which has been mentioned in a preceding part of this chapter.

16. Notwithstanding the invention of the writ of *subpæna*, it appears that the court of Chancery did not immediately possess itself of that absolute jurisdiction over persons enfeoffed to uses, which it afterwards exercised, for in the rolls of parliament, 9 *Hen.* 5. there is a petition of *William Lord Clynton*, stating that upon his going on an expedition to *Ireland*, he had enfeoffed *William de la Pool* of all his lands for the performance of his will. *Pool* having afterwards re-

fused

Rot. Parl.
vol. 4. p.
151.

fused to comply with his intentions, was personally called on and examined by parliament; and it was enacted, that he should re-enfeoff Lord *Clynton*, and the feoffment is entered on the rolls of parliament.

17. The abuses arising from the writ of *subpæna* were in some degree restrained by the statute 15 *Hen. 6. c. 4.* which reciting “ that divers persons had been
 “ greatly vexed and grieved by writs
 “ of *subpæna*, purchased for matters de-
 “ terminable by the common law of
 “ this land, to the great damage of such
 “ persons so vexed, and in subversion
 “ and impediment of the common law,”
 It was enacted that no writ of *subpæna* should be granted, until surety was found to satisfy the party so grieved and vexed, for his damages and expences, if the matter could not be made good, which was contained in the bill.

CHAPTER II.

Of the Nature and Qualities of a Use
before the statute 27 Hen. 8.

Nature of a use. 18. LORD Bacon in his justly celebrated Reading on the statute of Uses, observes that it is the Nature of all human science and knowledge to proceed most safely by negative and exclusive, to what is affirmative and inclusive, and speaking of uses he says “ an use is “ no right title or interest in law” neither *jus in re* nor *jus ad rem*, that is neither an estate nor a demand. So that it is nothing for which a remedy is given by the course of the common law, being a species of property totally unknown to it, and for which it was therefore impossible that it should have made any provision. Lord Bacon then proceeds to state affirmatively what it is—
 1 Rep. 140^a “ an use is a trust reposed by any person in the terretenant, that he may suffer him to take the profits, and
 Bac. R. 9. “ that
 “ that

“ that he will perform his intent—
 “ *Ufus est dominium fiduciarium*, use is an
 “ ownership in trust; so that *usus* &
 “ *status, sive possessio, potius differunt secun-*
 “ *dum rationem fori, quam secundum na-*
 “ *turam rei* for that one of them is in
 “ court of law, the other in court of con-
 “ science.”

19. The reason why the *cestui que use* had no property whatever, by the common law, in the lands given to his use, was, because where lands were legally conveyed to one person to the use of another, the limitation of the use was deemed absolutely void, as it only derived its effect from the declaration of the feoffor, whereas no legal right to a freehold estate in lands, could be transferred, without the ceremony of livery of seisin.

20. Thus in a case mentioned in the Year Books where *A.* enfeoffed *B.* to the use of himself. The judges observe that in chancery a man shall have his

4 Ed. 4. 8.

his remedy according to conscience. But in the Common Pleas and the King's Bench it was otherwise, for the feoffee should have the land, and the feoffor should have nothing against his own feoffment, though it was only upon confidence.

21. Although the *cestui que use* was generally in possession of the lands, yet he was only considered as tenant at sufferance, his title to the land was of so low and precarious a nature, that in a court of common law he could not even justify the seizing of cattle for trespass; and if he made a lease, the lessee might plead that *cestui que use* had nothing in the land.

1 Rep.
140. a.
Keil. 42.
And. 320.
Bac. R. 6.

22. When the court of Chancery first assumed a jurisdiction in cases of uses, it went no farther than to compel payment of the rents and profits to the *cestui que use*; but in process of time it proceeded another step, and established it as a rule, that the *cestui que use* had a right to

to call on the feoffees for a conveyance of the estate to himself, or to any other person whom he chose to appoint: and also to compel them to defend the title to the land. Hence Lord *Bacon* observes that, “ Pernancy of the profits, “ execution of estates, and defence of “ the land, were the three points of a “ use.”

23. This right in conscience to the rents and profits of land, which constituted a use, was not issuing out of the land, but was collateral thereto, and only annexed in privity to a particular estate in the land; that is to say, the use was not so attached to the land, that when it was once created, it must still have existed into whose hands soever the lands passed, as in the case of a rent, a right of common, or an advowson appendant; but it was created by a confidence in the original feoffee, and continued to be annexed to the same estate, as long as that confidence subsisted, and the estate of the feoffee remained un-
C altered.

Necessity of confidence and privity.

Plowd. 352. 1 Rep. 122. a. Poph. 71, 72.

altered. So that to the execution of a use, two things were absolutely necessary, confidence in the person, and privity of estate.

24. Confidence in the person signified that trust which was reposed in the feoffees, and arose from the notice which was given them of the persons who were intended to be benefited by the feoffment. This confidence was sometimes expressed, and sometimes only implied; thus if a feoffee to uses enfeoffed another person of the land, who had notice of the uses to which such land was liable, without any consideration, the new feoffee took it under an implied confidence, and was compellable to execute the use; for it was resolved, that wherever there were feoffees to a use, their heirs and feoffees, and all who came into the land under them, in the *per*, without consideration, or even upon valuable consideration, provided they had notice of the use, should be seised to such

such use, and be compelled in Chancery to execute it.

But if a feoffee to uses enfeoffed a stranger of the land for valuable consideration, who had no notice of the use, although there still remained a privity of estate, yet, as there was no confidence in the person, either expressed or implied, the use was destroyed, and the new feoffee could not be compelled to execute it. ^{1 Rep. 122. b.}

25. If a stranger purchased lands from a feoffee to uses for a valuable consideration, yet if he had notice of the former uses, he would be compelled to execute them; for although the consideration implied a feisin to his own use, yet the notice of the former uses was a circumstance, which in a court of equity, would render him liable to execute them. ^{Ibid.}

26. The idea of confidence in the person was at first extremely limited, for
C 2 it

it only extended to the original feoffee.
 Bac. R. Lord Bacon says, that in 8 *Edw.* 4. The
 23. Year judges were of opinion that a *subpæna*
 Book. 22 did not lie against the heir of the feoffee
 Edw. 4. 18. who was in by law, but that the *cestui*
que use was driven to his bill in parlia-
 ment.—It was however settled in the
 Keilw. 42. reign of *Hen.* 6. that a *subpæna* would
 b. lie against all those who came in, in the
per, without paying a valuable considera-
 tion; and also against all those who had
 notice of the former uses, although they
 did pay a valuable consideration.

27. With respect to privity of estate,
 it is to be observed that a use was a
 thing collateral to the land, and only
 annexed to a particular estate in the
 land, not to the mere possession thereof;
 so that whenever that particular estate
 in the land to which the use was origi-
 nally annexed was destroyed, the use
 itself was destroyed. Thus, where a
 person came into the same estate where-
 of the feoffee to Uses was seised, by
 contract or agreement with him, such
 person

person was liable to the former Uses; but if he came in of any other estate ^{1 Rep.} than that whereof the feoffee to Uses ^{122. a.} was seised, although he had full notice of the Use, yet the privity of estate was thereby destroyed, and consequently the lands were no longer liable to the Uses.

28. It followed from these principles ^{1 Rep.} that where a feoffee to Uses was disseis- ^{139. b.} ed, the disseisor could not be compelled in chancery to execute the use, because the privity of estate was destroyed, for the disseisor came in, in the *post*, that is, he did not claim by or from the feoffee to Uses, but came in of an estate paramount to that of the feoffee to Uses.

But if a person was disseised of lands ^{1 Rep.} which were liable to a rent, right of ^{122. b.} common or any other property of that kind, the lands would still continue subject to those charges, notwithstanding the disseisin, because they were annexed to the possession of the land.

29. In

1 Rep.
122. a.

29. In the same manner where a feoffee to Uses died without heirs, or committed a forfeiture, or married: neither the lord who entered for his escheat or forfeiture, nor the husband who claimed the lands as tenant by the curtesy, nor the wife who was assigned her dower, were liable to perform the trust, because they were not in, in the *per*, that is, in privity of the estate to which the use was annexed, but claimed an estate paramount to that which was liable to the Use.

*Who might
be seised
to uses.*

30. With respect to the persons who were capable of being feoffees to Uses, all private persons whom the common law enabled to take lands by feoffment might be seised to a Use, and were compellable in chancery to execute it.

Gilb. Uses
5. Plow.
102.

But no corporate body could be seised to a Use, because the court of chancery could issue no process against them for the execution of the Use.

31. Neither

31. Neither the king nor queen on account of their royal capacity, could be seised to any use but their own, that is, they might hold the lands, but were not compellable to execute the Use, as no process could be awarded against them by the court of chancery.

YearBook
7 Ed. 4.
17. Bac.
R. 56.

32. When king *Richard* 3. was duke of *Gloucester*, he had been frequently made feoffee to Uses, and therefore upon his accession to the throne he would have been intitled to hold the lands discharged of the uses.

To obviate so notorious an injustice, an act of parliament was immediately passed, which ordained that where the king had been so enfeoffed jointly with other persons, the lands should vest in the other feoffees, as if he had never been named, and that where the king stood solely enfeoffed, the estate itself should vest in the *cestui que use*, in like manner as he had the Use.

1 Rich. 3.
c. 5.

33. With

*What
might be
conveyed
to Uses.*
W. Jones
127.
Gilb. Uses
281.

33. With respect to the species of property which might be conveyed to uses, it was held, that nothing whereof the use was inseparable from the possession, such as annuities, ways, commons, &c. *quæ ipso usu consumuntur*, could be granted to a use, but that all corporeal hereditaments as also incorporeal inheritances which were *in esse*, as rents, advowsons, in gros, local liberties and franchises, might be conveyed to uses.

*Rules by
which Uses
were go-
verned.*
Bac.R. 13.

34. A use being a species of property totally unknown to the common law, and owing its existence to the equitable jurisdiction of the court of chancery, the rules by which uses were governed, were drawn from the civil law, and differed materially from those by which real property was regulated in the courts of common law. Hence Lord Bacon observes, that “uses stood upon their own reasons, utterly differing from cases of possession.”

*Could not
be raised
without
considera-
tion.*
Bac.R. 13.

35. By the common law a feoffment was good without any consideration; but

but it was established in chancery, that a use could not be raised without a sufficient consideration : and this rule was evidently taken from the maxim of the civil law, *ex nudo pacto, non oritur actio*, in consequence of which the court of chancery would not compel the execution of a use, unless it had been raised for a good, or a valuable consideration ; as that would be to enforce *donum gratuitum*.

36. Although a use was but a right, and could only be considered as a chose in action, which according to the principles of the common law is neither transferable nor assignable, yet a use might be aliened ; and Lord *Bacon* observes, there are two instances where a right to a use was allowed to be transferred ; for as no action at law could arise from such a transfer, there was no danger of maintenance.

Uses were alienable.
Bac. R.
16. Gilb.
Uses 26.

37. Lord *Bacon* also observes that there is no case at common law, where
a per-

Bac. R.

14.

a person can take under a deed, unless he is a party to it. Whereas a use might be declared to a person who was not a party to the deed, by which the use was raised; because a conveyance to a Use, was nothing more than a publication of a trust.

Gilb. Uses 27. 38. It frequently happened that a *cestui que use* being in possession, aliened the lands, and afterwards the feoffees entered, which gave rise to several vexatious suits in chancery. To remedy this inconvenience, the stat. 1. Rich. 3. c. 1. gave the *cestui que use* in possession a power of alienating the legal estate without the consent or concurrence of the feoffees.

39. A use might be transferred from one person to another by any species of deed or writing; and from its nature it was impossible that it could be the object of a feoffment with livery of seisin.

40. In

40. In the alienation of uses, none of those technical words which the law requires in the limitation of particular estates were deemed necessary. Thus a Use might be limited in fee-simple without the word heirs, for if a sufficient consideration was given, the chancellor would decree the absolute property of the use, to be well vested in the purchaser. And as a Use was a thing which consisted merely in confidence and privity, and was not held by any tenure, the rules of the common law were not violated.

41. A use might be limited in such a manner as to pass from one person to another upon the happening of some future event, contrary to the principles of the common law. Thus a use might be limited to *A.* and his heirs until some particular event should happen, and then to *B.* and his heirs, for although the rules of the common law do not allow an estate in fee simple to be limited after an estate in fee-simple; yet the court of chancery

No technical words of limitation necessary.

Palch. 27.

H. 8. 22.

1 Rep. 87.

b. 100. b.

Uses might change by matter subsequent.

Jenk.

Cent. 8.

52.

Bac R.
18.

chancery admitted this species of limitation to be good ; because, as Lord *Bacon* observes, “ things may be avoided, and
“ determined by the ceremonies and
“ acts, like unto those by which they
“ are created and raised ; that which
“ passeth by livery, ought to be avoided
“ by entry ; that which passeth by grant,
“ by claim ; that which passeth by way
“ of charge, determineth by way of discharge ; and so a Use which is raised
“ but by a declaration or limitation,
“ may cease by words of declaration or
“ limitation, as the civil law saith, *in his*
“ *magis consentaneum est, quam ut iisdem*
“ *modis res dissolvantur quibus constituantur.*”

Uses were
revocable.
Gilb. Uses
140.

42. It was determined upon the same principles that a power of revocation might be annexed to the limitation of a Use, by which means the grantor might at any future time revoke the Uses he had declared, and limit new Uses to other persons, which the feoffee to Uses was bound to execute.

43. A

43. A use not being considered as an ^{Uses not an} estate in the land, was not an ^{object of te-} object of ^{nure.} tenure, and was therefore freed from all those oppressive burthens which were introduced into *England* by the *Normans*, as consequences of the feudal system. Thus if a *cestui que use* was attainted of treason or felony, the use was not forfeited either to the king or the lord, because a Use was not held of any person. And therefore in some general acts of parliament relating to treason, as that of 21 *Rich. 2. c. 3.* and in most particular acts of attainder, that were passed after that time, there was a special provision made, that the persons attainted should forfeit all lands whereof they, or any other to their use, were seised; and in most of those acts provision was also made, to save from forfeiture, such lands whereof the persons attainted were seised to the use of others.

44. In the same manner if a *cestui que use* died leaving his son or daughter within age, the lord had not the wardships
or

or marriage of the heir, or a relief on the death of the ancestor; nor could he claim the lands as an escheat upon the death of the *cestui que use*, without heirs.

45. After the ecclesiasticks had been restrained by the stat. 15 *Rich. 2. c. 5.* from acquiring the Use of lands, it might be supposed that the practice of conveying lands to uses would have ceased. But it was soon found that this was the most effectual mode of evading the hardships of the feudal tenures, and particularly of securing estates from forfeitures for high treason. So that during the contests between the houses of *York* and *Lancaster*, as it was the constant practice to attain the vanquished, almost all the lands in *England* were conveyed to Uses.

*Neither
dower nor
curtesy of
a use.*

46. Another circumstance attending a Use was, that the husband or wife of a *cestui que use*, could neither be tenant by the curtesy, nor tenant in dower of the

the Use, because the *cestui que use* had no legal seisin of the land. This was a grievance much complained of, and therefore it became customary, when most estates in the kingdom were in the hands of feoffees to Uses, to settle some estate before marriage, on the husband and wife for their lives; which gave rise to modern jointures.

47. A Use was not extendible because ^{Uses not extendible.} there was no process at common law, but ^{1 Inst. 121.} against legal estates; and Uses were merely ^{b.} creatures of equity, against which there was no common law process; nor could Uses be considered as assets in the hands of executors, because they descended to the heir.

48. Uses were devisable although at ^{Uses were devisable.} that time lands were not, and Lord Bacon ^{Gilb. Uses} observes that one of the reasons why ^{35. 176.} so much land was conveyed to Uses, ^{Bac. R.} was, because persons acquired by that means a power of disposing of their property by will; which enabled them to make

make a much better provision for their family than they could otherwise have done.

YearBook Mich. 18 Ed. 4. 49. One of the first cases in the year books respecting Uses was, a woman, who had made a feoffment to Uses, afterwards married and devised that her feoffees should convey the legal estate to her husband. It was adjudged that the will was void at law, being made by a feme covert, and therefore should be also void in chancery. (a)

Uses were descendible. 50. There was however one instance in which the chancellors followed the rules of the common law. Uses descended in the same manner as legal estates, and the doctrine of the half blood was permitted to take place; even local customs were left unviolated in this instance, for if a *cestui que use* of

¹ Inst. 14.
b. Gilb.
Uses 18.

(a) It was a common practice for kings of *England* to make feoffments of lands to the use of their wills.—
Vide *Rot. Parl.* 4 *Ed.* 4. No. 11. vol. 6. p. 122.

lands

lands held in gavelkind, or borough *English* died, leaving several sons, the Use descended, either to all the sons equally, or to the youngest, according to the custom.

51. So where a person seised *ex parte materna*, made a feoffment to Uses, the Use descended, to his heirs *ex parte materna*, in the same manner as the legal estate would have done. Gilb. Uses. 17.

52. Thus stood the doctrine of Uses as it was regulated and settled by the court of Chancery : and in this state, it was in some instances, applied to very useful purposes, by removing the restraints on alienation, and enabling the proprietors of real property, to exercise several powers over it, which were not allowed by the rules of the common law. *Inconveniences of uses.*

But Uses soon became so general, and were applied for such bad purposes, that at length they were productive of very great grievances. Feoffments to Uses

D

were

were usually made in a secret manner, so that where a person had cause to sue for land, he could not find out the legal tenant against whom he was to bring his *præcipe*; heirs were frequently disinherited by means of feoffments to the use of a person's last will; widows were deprived of their dower, and husbands of their tenancy by the curtesy; the king and the feudal lords, lost the profits of their tenures, their fines for alienation, wardships, marriages, heriots, and reliefs; and an universal obscurity and confusion of titles prevailed, by which means purchasers for a valuable consideration were frequently defrauded.

*Statutes
made to
remedy
them.*

53. To remedy these inconveniences several statutes were made, to subject Uses to the same rules as legal estates. By *stat. 50 Ed. 3.* it was enacted, that where persons conveyed their tenements to their friends, by collusion to have the profits at their will, their creditors should have execution of such tenements, as if no such gifts had been made.

Two

Two other statutes of the same kind were made, 1 *Rich.* 2. c. 9. and 2 *Rich.* 2. *stat.* 2. §. 3.

By *stat.* 1 *Rich.* 3. c. 1. reciting that by privy and unknown feoffments great insecurity, trouble, costs, and grievous vexations daily grew; it was therefore enacted, that all acts and conveyances made by persons having only the use of lands should be good and effectual, not only against the persons making such acts, but also against all persons having or claiming any estate or interest in the same to the use of those who should make such acts.

By the *stat.* 1 *Hen.* 7. reciting that where divers of the king's subjects having cause of action by formedon, &c. be defrauded and delayed of their said actions, and oftentimes without remedy, because of feoffments made of the same lands and tenements to persons unknown, &c. it was enacted that the demandant in every such case, should

have his action against the pernor or per-nors of the profits of the lands or tenements demanded, whereof any person or persons had been enfeoffed to his or their use.

By the stat. 4 *Hen. 7. c. 17.* It was enacted, that if any person or persons should be seised of any estate of inheritance, being tenant immediate to the lords of any castles, &c. holden by knight's service, to the use of any other person or persons and of his heirs only, he to whose use he or they be so seised dieth, his heir being within age, no will by him declared, nor made in his life touching the premises, the lord of whom such castles, &c. be holden immediately should have a writ of right of ward as well for the body as for the land, as the lord should have had, if the same ancestor had been in possession of the estate so being in use at the time of his death, and no such estate to his use made, and that if any such heir be of full age at the death of his ancestor, to
pay

pay relief as his ancestor, whose heir he is would have paid if he had been in possession of that estate so being in use at the time of his death, and no such estate in his use made or had.

By the stat. 19 *Hen. 7. c. 15.* it was enacted, that it should be lawful for every sheriff, or other officer, to whom any writ or precept should be directed, at the suit of any person or persons, to have execution of any lands, tenements or other hereditaments against any person or persons, upon any condemnation, statute merchant, &c. to make and deliver execution unto the party in that behalf suing, of all such lands and tenements, as any other person or persons be in any manner of wise, seised to the only use of him against whom execution was so sued.

CHAPTER III.

Of the Statute 27 *Hen.* 8. of Uses.

*History of
the Sta-
tute.*

54. NOTwithstanding the variety of statutes by which it was endeavoured to make Uses subject to the rules of the common law, yet means were found of evading them, particularly in cases of wardships, marriages and reliefs ; for in the stat. 4 *Hen.* 7. for enabling lords to have the wardships of persons intitled to a Use only, an exception was inserted, where the ancestor had made a will, of which many persons took advantage to the great detriment of the king and the chief lords.

6 Rep.
76. a.

Burnet's
Hist. of
the Ref.
vol. I. p.
116.
4 Reeves
241.

55. King *Henry VIII.* in the 23d year of his reign, caused a bill to be drawn to moderate, not to remedy altogether this abuse ; he was contented that every man should have the liberty of disposing in this manner of half his land, and he told

told the parliament in plain terms, if they would not take a reasonable thing when it was offered, he would search out the extremity of the law, and then would not offer them so much again. The Lords came willingly into his terms, but the Commons rejected the bill, in consequence of which the parliament was prorogued (a) The king made good his

(a) Justice *Harper* gives the following History of the statute of Uses.—“ And as to the making of the
 “ statute 27-*Hen.* 8. The truth is, that the king was
 “ displeased for the loss of wardships and other injuries done to him; for which cause he complained
 “ to the judges of the defect of the law in that case,
 “ who thereupon shewed unto the king, the causes of
 “ those injuries and losses to the king, and further shewed to the king, that if the possession might be joined to the Uses, all would go well, and all the injuries, wrong and loss, which came to the king by reason of such Uses, wills, and secret feoffments
 “ would be avoided. For which the king commanded his council to frame a bill to that purpose, and
 “ present it to the house of commons in the twenty-fourth year of his reign, but it was then rejected,
 “ and the king at that time would have been contented, that the fourth part of the land only should descend:

his threats, he called together the judges and ablest lawyers, who argued the question in chancery, and agreed that a man could not devise any part of his land in prejudice of his heir.

No account of these arguments is to be found in the Year Books ; nor do I believe they are mentioned by any legal writer ; but it is probable that this determination only related to the devise of land, not to that of a Use, so that all the inconveniences arising from the practice of devising Uses, still continued.

*Statute of
Uses.*

56. The mischiefs arising from the practice of making feoffments to Uses

“ descend : and from that time the king stayed
 “ further proceedings in the said cause until
 “ 27 *Hen.* 8. at which time it took effect : and their
 “ care was to pen the statute so precisely that no-
 “ thing should be left in the feoffees, but that the whole
 “ estate should be executed by the statute, so as the said
 “ statute did utterly take out all from the feoffers.”
 2 *Leon.* 17, 18.

increased

increased every day, so that it became absolutely necessary to apply a sufficient remedy to these disorders. This was effected by the statute 27 *H. 8. c. 10.* intituled an act, concerning uses and wills, usually called the statute of Uses, reciting that by the common law lands were not devisable by will, nor ought to be transferred but by livery of seisin, yet nevertheless divers and sundry imaginations, subtle inventions and practices had been used, whereby the hereditaments of the realm had been conveyed by fraudulent feoffments, fines, recoveries and other assurances, and also by wills and testaments; by reason whereof heirs had been unjustly disinherited, the lords had lost their wards, marriages, reliefs, heriots, escheats, aids; married men had lost their tenancies by the curtesy, and women their dower, manifest perjuries were committed, &c.

57. It is therefore enacted, “ That
 “ where any person or persons stand or
 “ be seised, or at any time hereafter shall
 “ happen

“ happen to be seised of and in any
 “ honors, castles, manors, lands, tene-
 “ ments, rents, services, reversions, re-
 “ mainders or other hereditaments, to
 “ the use, confidence or trust of any
 “ person or persons, or of any body
 “ politick, by reason of any bargain, sale,
 “ feoffment, fine, recovery, covenant,
 “ contract, agreement, will, or other-
 “ wise by any manner or means whate-
 “ ver it be, that in every such case, all
 “ and every such person and persons and
 “ bodies politick that have, or hereafter
 “ shall have, any such use, confidence
 “ or trust in fee-simple or fee tail, term
 “ of life or for years or otherwise, or
 “ any use, trust or confidence in remain-
 “ der or reversion, shall from henceforth
 “ stand and be seised, deemed and ad-
 “ judged in lawful seisin, estate and pos-
 “ session, of and in the same honors,
 “ castles, &c. to all intents, constructions
 “ and purposes in the law of, and in such
 “ like estates as they had or shall have
 “ in use, trust or confidence, of or in the
 “ same, and that the estate, right, title,
 “ interest,

“ interest, and possession that was in such
 “ person or persons, that were or here-
 “ after shall be seised of any lands, tene-
 “ ments, or hereditaments, to the use,
 “ confidence or trust of any such person
 “ or persons, or of any body politick, to
 “ be from henceforth clearly deemed and
 “ adjudged to be in him or them that
 “ have or hereafter shall have such use,
 “ confidence, or trust, after such quality,
 “ manner, form and condition as they
 “ had before, in or to the use, confi-
 “ dence, or trust that was in them.

4. & 5. “ And where divers persons
 “ stand seised of any lands to the use and
 “ intent that some other person shall re-
 “ ceive a rent out of the same lands, in
 “ every such case the person having such
 “ Use and interest to have the same rent
 “ shall be adjudged, and deemed to be in
 “ possession and seisin of the same rent,
 “ of and in such like estate, as he had in
 “ the Use of the said rent.”

58. It is evident from the words of this statute, that the intention of the Legislature was, entirely to abolish Uses, by destroying the estate of the feoffees to uses, and transferring it from them, to the *cestui que use*; by which means the Use should be changed into a legal estate. And the operation of the statute has so far answered the intention of the makers of it, that no Use, upon which the statute is allowed to operate, can exist in its former state for above an instant, as the legal seisin and possession of the land must become united to it immediately upon its creation.

59. In consequence of this statute, lands conveyed to Uses could never in future become liable to the charges or incumbrances of the feoffees; but on the other hand they would be always subject to the charges and incumbrances of the *cestui que use*, and to all the rules of the common law; so that they ceased to be devisable, and by that means the great object of *Hen. 8.* was attained, which
was

was to preserve his right to wardships and other feudal profits out of the lands of the Nobility.

60. Soon after the statute of Uses was made, the judges determined that from thenceforth all conveyances to Uses should be construed according to the rules of the common law, it being the intention of the statute 27 *Hen. 8.* “to restore the good and antient common law, and not to give more privilege to the execution of Uses, than to estates which are executed by the antient common law.”—That the same technical words should be used in the limitation of Uses, which were necessary in the limitation of legal estates.

61. There are three circumstances necessary to the execution of a Use by this statute. 1st. A person seised to the use of some other person. 2d. A *cestui que use in esse*. And 3d. a Use in *esse*, in possession, remainder or reversion.

Circumstances necessary to the operation of the statute.
1 Rep. 87.
b. 130. a.
138. a.
Poph. 77.

62. With

*First a
person sei-
sed to a
use.*

62. With respect to the first of these circumstances, the words of the statute expressly require it.—“Where any person or persons stand or be seised, or at any time hereafter shall happen to be seised of any honors, &c. to the use, confidence or trust of any other person or persons.”—It will however be necessary in this place to enquire, first, what persons are capable of being seised to Uses, and second, of what estate or interest they can be seised to Uses.

*What per-
sons may
be seised
to Uses.*

63. All persons who were capable of being seised to Uses before the statute, may still be seised to a Use: and on the other side, all those who were incapable of being seised to Uses, before the statute, still labour under the same incapacity.

64. A singular case arose in 35 *Eliz.* respecting the prerogative of the crown, to hold lands discharged of all Uses.

A. com.

A. committed high treason, 18. *Eliz.* Pimb's Case, Mo. 196. 1 Inst. 13. a. n. 7. for which in 26 *Eliz.* he was attainted by trial. Between the treason and the attainder a fine was levied to him by *B.* of certain lands to the use of *B.* and his wife (who was sister to *A.*) and of the heirs of the said *B.*—Afterwards *B.* and his wife bargained and sold the lands to *J. S.* for money. Upon discovery of the treason and the attainder of *A.* the purchaser *J. S.* was advised by *Plowden*, *Popham* and many others, that the estate of the land was in the queen, because the queen is intituled to all the lands that traitors had at the time of the treason, or after. So the Use which was declared to *B.* and his wife upon the fine was void, by the relation of the right of the queen under the attainder, and the queen must hold the land, discharged of the Use, because the crown cannot be seised to a Use.

It is but justice to mention that, the case being represented to queen *Elizabeth*,
she,

she, much to her honour, granted the land to the *cestui que use* by patent.

Bac. R.
42. 1 Rep.
122. a.

King v.
Boys, Dy.
283. b.

65. By the very words of the statute which are “any person or persons” aliens and corporations are incapable of being seised to a Use. And therefore it was determined in a case reported by *Dyer*, that where an alien and another were enfeoffed to Uses, the moiety of the alien should, upon office found, become vested in the crown.

Of what
estate a
person may
be seised to
Uses.

66. With respect to the estate or interest of which a person may be seised to a Use; the words of the statute are “Where any person or persons stand or be seised, or at any time hereafter shall happen to be seised” now the word seised extends to every species of estate of freehold, although it appears to have been the general opinion, both before, and immediately after the passing of this statute, that all feoffees to Uses must have been seised in fee-simple.

67. It

67. It was formerly much doubted, *Tenant in*
 whether a tenant in tail could be seised *tail. Gilb.*
 to a Use, and *Jenkins* states it as a point *Uses 205.*
 determined by all the judges, that a *Jenk.*
Cent. 5.
ca. 1.
 tenant in tail cannot be seised to a Use,
 either expressed or implied: 1st, Be-
 cause the tenure creates a consideration,
 2d, Because the statute *de donis* has so
 appropriated and fixed the estate tail to
 the donee and the heirs of his body,
 that neither he nor they can execute the
 Use.

68. The case cited by *Jenkins*, in sup-
 port of this doctrine is, that of *Cowper*
v. Franklin, which arose in 12 *Jac. 1.*
 and is thus reported by *Croke*.—*John*
Walter being seised in fee, made a *Cro Jac.*
 feoffment to *Thomas Walter*, *habendum* *400.*
 to him and his heirs of his body, to the
 use of him and his heirs and assigns for
 ever. The question was, whether *Tho-*
mas Walter had an estate in fee-tail only,
 or in fee, determinable upon the estate-
 tail. First, Whether a Use might be li-
 mited upon an estate tail at the common
 E law,

law, or after the statute of Uses. 2d, Whether this limitation of Uses to him and his heirs should not be intended the same Uses, being to the feoffee himself, and to the same heirs, as it is in the *habendum*. *Croke* says, the case was adjourned, but the opinion of the court, upon the argument, inclined that he was tenant in tail, and that the limitation of the use out of the estate-tail was void, as well after the statute as before ; for the statute never intended to execute any use, but that which might be lawfully compelled to be executed, before the statute, but this could not be of an estate-tail, for the chancery could not compel him at the common law to execute the estate, and so the statute did not execute it then.

3 Bulst.
184.

69. *Bulstrode* reports a second argument upon this case, together with the judgment of the court, which was, that *Thomas Walter* took an estate-tail, because a tenant in tail could not be seised to a use.

70. *Godbolt*

70. *Godbolt* reports this case to have ^{Godb. 269} arisen upon a limitation to one, and to the heirs of his body, *habendum* unto the donee, to the use of him, his heirs and assigns for ever ; and that two points were resolved, First, That the limitation in the *habendum* did not increase or alter the estate given in the premisses of the deed. Second, That tenant in tail might stand seised to an use expressed, but such use could not be averred.

71. This case is also reported by *Moore*, ^{Moo. 848} by the name of *Carrier v. Franklin*, who seems to have considered it as a question of construction, and that the feoffee took only an estate-tail, because the use to him and his heirs, immediately succeeding the *habendum*, must be construed to mean the same kind of heirs, to whom the estate had been already limited, that is, the heirs of his body.

72. If this case be considered as an authority, it will only prove that a tenant in tail cannot be seised to a use in

fee ; but that a tenant in tail may be seised to a use, co-extensive with his right, is a doctrine which it would now be extremely dangerous to controvert ; and Lord *Bacon* expressly says, that a tenant in tail may be seised to a use.

Dyer. 311. “ If I give land in tail by deed since the
b. 312. a. “ statute, to *A.* to the use of *B.* and his
Bac. R. 57 “ heirs, *B.* hath a fee-simple, determin-
 “ able upon the death of *A.* without
 “ issue ; and like law, though doubtful,
 “ before the statute was ; for the chief
 “ reason that bred the doubt before the
 “ statute was, because tenant in tail
 “ could not execute an estate without
 “ wrong ; but that, since the statute is
 “ quite taken away, because the statute
 “ saveth no right of intail, as the statute
 “ of 1 *Rich.* 3. did.

10 Rep.
 95.

73. In *Seymor's* case 10 *Jac.* 1. a tenant in tail bargained and sold his estate-tail to a stranger in fee. And it was unanimously resolved by the court of king's bench, that the bargainee took an estate to him and his heirs, determinable upon the death of the tenant in tail.

Now

Now this determination must have been founded upon the principle that a tenant in tail may be seised to a Use, for otherwise the bargain and sale would have ^{Vide infra. ch. 4.} been void.

74. It may therefore be now laid down as an undoubted principle of law, that a tenant in tail may be seised to a Use, even in fee, and that such use will be good against the tenant in tail. And as tenants in tail have ever since the modern practice of conveyancing, frequently transferred their estates to the persons who were to be tenants to the *præcipes*, and to their heirs, by conveyances derived from the statutes of Uses; if it were established, that a tenant in tail cannot be seised to a Use, the consequence would be, that almost all the common recoveries which have been suffered for the last century, would be void, for want of a good tenant to the *præcipe*.

*Tenant for
life.*

75. A tenant for life may be seised to a Use, but such Use will determine, together with the legal estate transferred to it by the statute, upon the death of the tenant for life.

Dyer 186.
a. Craw-
ley's case,
Cro. Eliz.
721.

76. In 2 & 3 *Eliz.* This case was moved.—Lands were given to two persons for their lives, and the life of the survivor, to the use of *A. B.* for his life. The two donees to Uses died, and the question was, whether the estate of *A. B.* was determined. The court thought that the estate was determined, because the estate on which the Use was created and raised was gone.

Cro. Car.
231.

77. It follows from this case, which is cited and admitted to be good law, in *Bulstrode's Report* of *Cowper v. Franklin* that all persons having a legal estate of freehold may be seised to a Use. If the Use is greater than the estate out of which it is created, it will cease upon the determination of such estate, but will be good in the mean time.

78. With

78. With respect to the different kinds of property whereof a person may be seised to a Use of another, the words of the statute are, "honors, castles, manors, lands, tenements, rents, services, reversions, remainders or other hereditaments," which comprehend every species of real property in possession, remainder or reversion; and therefore not only corporeal hereditaments, but also incorporeal ones, such as advowsons, tithes, rents, &c. are within this statute.

79. Nothing however can be conveyed to Uses which is not *in esse*, at the time; and therefore where a person bargained and sold lands to J. S. in fee, with a way over his land; it was determined that the right of way did not pass; for nothing but a Use passed by the deed, and there cannot be a Use of a thing which is not *in esse*, as a way, common, &c. which are newly created: and until they are created no use can be raised by bargain and sale.

80. Copyhold estates are not comprehended within this statute, because a

transmutation of possession by the sole operation of the statute, without the concurrence or permission of the lord, would be an infringement of the lord's right, and would tend to his prejudice.

2d. A *cestui que use in esse*.

81. The second circumstance necessary to the execution of a use by this statute is, that there must be a *cestui que use in esse*. If therefore a Use be limited to a person not *in esse*, or to a person uncertain, the statute can have no operation.

Bac. R. 60.

Bac. R. 42.

82. With respect to those who may be *cestuis que use*, all persons capable of taking lands by any common law conveyance may be *cestuis que use*. And by the express words of the statute, a corporation may be a *cestui que use*.

The *cestui que use* must be a different person from him who is seif-

83. The *cestui que use* must in general be a different person from him who is seised to the use; for lord Bacon says, "the whole scope of the statute was to remit the common law, and never

" to

“ to intermeddle where the common law ^{ed to the}
 “ executed an estate; therefore the com- ^{use.}
 “ mon law ought to be expounded, that ^{Bac. R.}
 “ where the party seised to the Use, and ^{63.}
 “ the *cestui que use* is one person, he ne-
 “ ver taketh by the statute, except there
 “ be a direct impossibility, or impertinen-
 “ cy for the Use to take effect by the
 “ common law.”

84. Lands were given to a man and ^{Jenkins v.}
 his wife, *habendum* to the said husband ^{Young.}
 and wife, to the use of them and the ^{Cro. Car.}
 heirs of their two bodies, and for default ^{230.}
 of such issue, to the use of *A. B.* The
 question was whether the husband and
 wife had an estate tail, or but for their
 lives. And it was adjudged that they
 had an estate tail.

Upon a writ of error in the king's
 bench, it was argued that the estate out
 of which the use arose was but for their
 lives, and consequently the use could not
 be limited for a larger estate: but *Croke*,
Jones, and *Whitlock*, were of opinion that
 there

there was a difference, where an estate was limited to one, and the use to another, there the use could not be more than the estate out of which it was derived; but not when the limitation was to two, *habendum* to them, to the use of them and the heirs of their bodies, this was no limitation of the use, nor was the use to be executed by the statute, but they took by the common law.

Meredith
v. Joans,
Cro. Car.
245.
Skin. R.
209.

The same case was again argued in the subsequent term, when all the court held that the limitation in the *habendum* was a limitation of the land itself, and not of the use, and affirmed the former judgment.

Gilb. R.
17.

85. In the same manner if a fine be levied to a man and his heirs, to the use of him and his heirs, he shall take by the common law, and not by the statute of Uses.

86. There are however some cases in which the same person may be seised to a Use,

a Use, and also *cestui que use*; as if a man seised of lands in fee-simple, covenants that he and his heirs will stand seised of the same lands, to the use of himself and the heirs of his body, or to the use of himself for life, remainder over in fee: in this case the estate which the covenantor had by the common law, is divested out of him by the operation of the statute, and a new estate vested in him, according to the limitation of the Use.

87. The third circumstance necessary ^{3d. A Use in esse.} to the execution of a Use by this statute, is, that there should be a Use *in esse*, in ^{1 Rep. 126 a.} possession, remainder or reversion. When all these circumstances concur, the possession and legal estate in the lands, out of which the Use was granted, is immediately taken from the feoffee to Uses, and vested in the *cestui que use*, and the possession thus transferred is not a mere seisin or possession in law, but an actual ^{2ac. R. 46 Anon. Cro Eliz. 46.} seisin and possession in fact, not a mere title

title to enter upon the land, but an actual estate.

*Saving of
all former
estates.*

88. In the third section of the statute is contained a saving to all those persons, and to their heirs, who were or thereafter should be seised to any Use, all such former right, title, entry, interest, possession, rents, customs, services, and action, as they might have had to their own proper use, in or to any manors, lands, tenements, rents, or hereditaments, whereof they were or should be seised to any other use.

7 Rep. 19.
b, 20. a.

89. In consequence of this clause, no term for years or other interest, whereof a person to whom lands are conveyed to Uses is possessed, in his own right, will be merged by such conveyance.

Ferrers
and Cur-
son v.
Fermor,
Cro. Jac.
643.

90. *A.* demised lands to *B.* for a term of years, and afterwards the lessor by bargain and sale inrolled, and fine conveyed the same lands to the lessee and others and their heirs, to the Use of them

them and their heirs, to the intent that a common recovery should be had and suffered against them, with voucher of the lessor, to the use of a stranger, all which was done accordingly.

The question was whether the term for years was merged ; and it was determined that the term still existed, for although it was merged by the union of estates until the recovery was suffered, yet when that was done, the uses thereof being guided by the bargain and sale, it was the same as if there had been no conveyance, it being within the equity and intention of the saving in the third section of the statute of Uses ; for the intention of that statute was, not to destroy prior estates, but to preserve them. And it was agreed by the whole court that if a fine or feoffment had been levied or made to the lessee for years, his term would not have been thereby extinguished.

It

It was objected that the bargain and sale and fine, were to the use of the lessee for years, otherwise he could not have been tenant to the *præcipe*, and therefore the saving in the statute of Uses did not extend to this case. But it was answered and resolved, for the former reasons, that the term was saved by the equity of the statute.

Vide Cook
v. Fountain.
1 Vent.
195. 280.

CHAPTER IV.

Of the several Conveyances derived from
the statute of Uses.

91. **I**T has been frequently observed that ^{1 Rep.} the principal object of the statute 27 *Hen.* ^{125. a.} 8. was to destroy all those secret conveyances to Uses which had been so much complained of; but that instead of having that effect, this statute has given rise to several new modes of transferring lands unknown to the simplicity of the common law, and of a more secret nature than feoffments to Uses: so that notwithstanding the great caution with which this statute was made, it has not answered the intention of the Legislature. ^{1 Atk. 591}

This observation seems to have been founded on an idea, that the chief object of the statute of Uses, was to destroy all conveyances to Uses. But Lord *Bacon* ^{Bac. R. 39.} has clearly proved that the intention of
this

this statute was only to destroy the estate of the feoffees to Uses, by transferring it to the persons who were intitled to the use; and not to destroy the form of the conveyance to uses. 1st. Because the words of the statute are “where any “person is seised or *hereafter* shall be seised to any use.” 2d. In the same sessions in which this statute was made, it was enacted that all bargains and sales to uses should be inrolled; which proves that the intention of the legislature was to leave the form of the conveyance, with the addition of a further ceremony. 3. By the 12th section of this statute it was provided that the king should not take any primer seisin, or other feudal profits, on account of any estate which should be executed by means of that statute until the 1st of *May* 1536. But that he should take the feudal profits for all uses which should become executed by the statute *after* that time.

92. But whatever might have been the intention of the Legislature in passing
ing

ing this statute, it is certain that it has given rise to several new sorts of conveyances, which operate contrary to the rules of the common law, for it being soon observed that there was nothing in the statute, to prevent the raising of Uses, but only a provision that when a Use was raised, the possession of the land should be transferred to such use, it was only necessary to raise a use, and the legal seisin and estate became immediately vested in the *cestui que use*, without li- Ante f. 87.
very of seisin, entry or attornment.

93. In consequence of this doctrine conveyances to uses were generally adopted, and are divided into two sorts; the first of which are said to operate without any transmutation of possession, because the alteration of the legal seisin, is effected by the mere operation of the statute. The second are said to operate by means of a transmutation of possession, because the legal seisin, is first transferred by some common law conveyance.

F

94. The

*Bargain
and sale to
uses.*

4 Reeves
161.

94. The first conveyance derived from the statutes of uses which operates without any transmutation of possession, is a bargain and sale to uses, which was well known, and often used before the statute of uses, it being a common practice in those times for a person who was seised of lands, to bargain and sell them to another, in which case if the consideration was sufficient to raise a use, the bargainor became immediately seised to the use of the bargainee; all which might have been transacted without the formality of a deed.

2 Inst.
672.

95. A bargain and sale is therefore a real contract, whereby a person bargains and sells his lands to another for a pecuniary consideration, in consequence of which a use arises to the bargainee, and the statute 27 *Hen.* 8. immediately transfers the legal estate and actual possession to the *cestui que use*, without any entry or other act on his part.

*What
words ne-
cessary.*
2 Inst.
672.

96. The proper and technical words of this conveyance are *bargain and sell*, but

but any other words that would have been sufficient to raise a use, upon a valuable consideration, before the statute, are now sufficient to constitute a good bargain and sale. But all proper words of limitation must be inserted, *Gilb. Uses*, otherwise no more than an estate for ¹⁰⁵ life will pass.

97. *Edward Fox*, by indenture in *Fox's case.* consideration of 50*l.* paid to him by ^{8Rep. 93.} *Thomas Powys*, demised, granted, set, and to farm let to the said *Thomas Powys* certain lands and tenements, to hold to the said *Thomas Powys*, from the day of the date of the same indenture, for the term of 99 years, yielding and paying the rent of 40*s.*—The question was whether this deed should be deemed to be a bargain and sale to uses; and it was adjudged that it should, for a freehold estate may pass by deed indented and inrolled without the words bargain and sell, if there are other words tantamount to them. As if a man covenants in consideration of money to stand seised

to the use of his son in fee, if the deed be inrolled, it will be a good bargain and sale, although the words bargain and sell are not inserted in it. So if a man for money, aliens and grants lands to one and his heirs, or in tail, or for life, by deed indented and inrolled, it will amount to a bargain and sale.

Vide Taylor v. Vale, Cro. Eliz. 166.

Who may convey by bargain and sale.

98. With respect to the persons who are capable of conveying their estates by bargain and sale, as this conveyance only transfers a use, none but those who are capable of being seised to a use can bargain and sell; for there must be a person seised to a Use, and a Use *in esse* before the statute can have any operation.

Atkins v. Longville. Cro. Jac. 50.

99. It follows that neither the king, the queen, nor a corporation aggregate can convey their lands, by bargain and sale. But as to a tenant in tail, it has been already shewn that he may be seised to a Use, and therefore a bargain and sale by him will be good.

100. It

100. It is said by *Jenkins Cent. 6. ca.* 88. that a bargain and sale by the king, for any consideration, to a corporation is good, although the king cannot stand seised to the use of another: and the consideration of money paid, or mentioned to be paid, although by any stranger, makes the conveyance and bargain and sale valid.

101. Lord Chief Baron *Comyns* has said that a corporation may bargain and sell land, for they may give an Use, though they cannot be seised to an Use. This position is founded on the authority of the following case.

102. The prioress of *Hallywell* being seised of the manor of *Priors* granted the same by the words *dedi et concessi pro certa pecuniæ summa*, to Lord *Audley*, the chancellor of *England* and his heirs. It was objected that a bargain and sale by a corporation, was not good, for, a corporation could not be seised to another's use, and the nature of such a conveyance was to take effect by way of Use

Dig. Tit.
Bargain
and sale,
(B. 3.)

Holland
and Bo-
nis's case.
3 Leon.
175.

use in the bargainee, and afterwards the statute drew the possession to the Use. But the court utterly rejected the said exception as dangerous, for that such were the conveyances of the greater part of the possessions of monasteries. And it was said by *Shuttleworth* Serjeant that although such a corporation could not take an estate to another's use, yet they might charge their own possessions with an Use to another.

*What may
be convey-
ed by bar-
gain and
sale.*

103. Any estate or freehold or inheritance, may be conveyed by bargain and sale, but there must be an actual feisin in the bargainor at the time when the bargain and sale is made, for without a feisin no Use can arise.

104. Estates in remainder or reversion, expectant upon the determination of any preceding estate for years, for life, or in tail, may be conveyed by bargain and sale.

105. A

105. A rent *in esse* may be conveyed by bargain and sale, as also an advowson, tithes or any other incorporeal hereditament ; because they are expressly mentioned in the statute of uses. But such incorporeal hereditaments, must be in actual existence at the time. Antef. 79.

106. No chattel interest can be conveyed by bargain and sale, because the possessor of a chattel interest, has no seisin. It should however be observed that where a person is seised of the freehold of lands, he may by bargain and sale create a chattel interest out of such lands; for having a seisin in himself he is enabled, as well to raise a use for years, as for any greater estate. And by the very words of the statute, the possession is as fully transferred to a *cestui que use*, for years, as to a *cestui que use* of a freehold : nor will an entry be necessary in this case to vest the legal estate.

107. A bargain and sale is merely a conveyance of a use, and as a use cannot *Considera-
tion.*

not

not be raised without a consideration, it follows that no bargain and sale can be good without a consideration, which must also be a pecuniary one, for the very name of the conveyance imports a *quid pro quo*, but it is not absolutely necessary, that the consideration should be stated, as an averment that a valuable consideration was actually paid is admissible, and will be sufficient to raise a use to the bargainee.

1 Rep. a.
176. a. 108. A person by indenture, reciting that whereas J. S. was bound in a recognizance and other bond for him, for divers good causes and considerations, bargained and sold the lands to him and his heirs. It was proved that there was no money paid, and therefore it was determined that the conveyance was void as a bargain and sale.

Croffing
v. Scudamore. 1
Vent. 137.
S. P. Cro.
Jac. 127. 109. A person in consideration of natural love, and for augmentation of the portion, and preferment in marriage of his daughter, bargained and sold lands

lands to her. It was determined that the deed could not operate as a bargain and sale, because no pecuniary consideration was given.

110. At common law no rent could be reserved on a bargain and sale, because nothing but a Use passed, which was not such an estate as the bargainor could have recourse to for a distress. But now a rent may be reserved on a bargain and sale, and such rent will be considered as a sufficient consideration.

111. By the Stat. 6 *Ann. c. 35. §. 30.* It is enacted that in all deeds by bargain and sale inrolled, whereby any estate of inheritance in fee-simple is limited to the bargainee and his heirs, the words grant, bargain, and sell, shall amount to, and be construed and adjudged in all courts of judicature to be express covenants to the bargainee, his heirs and assigns, from the bargainor, for himself, his heirs, executors and administrators, that the bargainor, notwithstanding any act

1 Inst. 144.
a. Wykes
v. Tyllord
Cro. Eliz.
595.

*The words
grant bar-
gain and
sell amount
to a cove-
nant for
the title.*

act done by him, was at the time of the execution of such deed, seised of the hereditaments thereby granted, bargained and sold, of an indefeasible estate in fee-simple, free from all incumbrances; (rents and services due to the lords of the fee only excepted) and for quiet enjoyment thereof, against the bargainor, his heirs and assigns, and all claiming under him: unless the same shall be restrained and limited by express particular words, contained in such deed: and that the bargainee, his heirs, executors, administrators and assigns, respectively shall and may in any action to be brought, assign a breach or breaches thereupon, as they might do in case such covenants were expressly inserted in such bargain and sale.

Inrollment

2 Inst. 671.

Gilb. Uses

90

112. When the statute of Uses was made, it was immediately foreseen, that all lands would thenceforth be conveyed by bargain and sale, being a conveyance of a secret nature. To prevent this, the Legislature in the same sessions passed an

an act, (27 *Hen.* 8. c. 16.) by which it is enacted, that no manors, lands, tenements or other hereditaments shall pass, whereby any estate of inheritance or freehold shall be made, by reason of any bargain and sale, except the same bargain and sale be in writing indented, sealed and inrolled in one of the king's courts of record at *Westminster*, or within the county where the lands lie, before the *custos rotulorum* and two justices of the peace, and the clerk of the peace of the same county, or two of them at the least, whereof the clerk of the peace to be one.

113. By the statute 5 *Eliz.* c. 6. bargains and sales affecting lands, tenements or hereditaments in the counties palatine of *Lancaster*, *Chester* and the bishoprick of *Durham* are directed to be inrolled in their respective courts of those counties.

By the 5 *Ann.* c. 18. Bargains and sales of any manors, lands, &c. within
the

the West-Riding of the county of *York*, may be inrolled at *Wakefield*.

By the 6 *Ann. c. 35.* the same provision is made for inrolling bargains and sales of lands situate in the East-Riding of the county of *York*, at *Beverley*.

By the 8 *Geo. 2.* Bargains and sales of lands situated in the North Riding of the county of *York*, may be inrolled in the register office of that riding.

² Inf. 674. ⁵ Rep. 1. b. 114. The time prescribed for inrollment by the statute, is six lunar months, to be computed from the date of the deed; the date being exclusive: and if the deed has Hob. 140. no date, then the time must be computed from the delivery.

Doug. 57. 115. The indorsement on the back of the deed, by the proper officer, is always received as evidence of the inrollment.

116. By

116. By the statute of 10 *Ann. c. 18. f.*
 3. It is enacted that a copy of the inrollment of a bargain and sale, examined with the inrollment, and signed by the proper officer, having the custody of such inrollment, and proved upon oath to be a true copy so examined and signed, shall in all cases where a bargain and sale shall be pleaded with a *profert in curia*, be of the same force and effect as the indenture of bargain and sale would be if the same was produced.

117. There is a proviso in the statute of Inrollments, that nothing therein contained shall extend to lands, tenements and hereditaments lying within any city, borough, or town corporate wherein the mayors, recorders, &c. have authority to inroll.

118. In consequence of this proviso, ^{2 Inst. 676} lands in cities, boroughs, &c. that have the privilege of inrollment, are not within the act: for although the intention of the statute was to exempt them from inrollments

inrollments in the courts at *Westminster* only, yet the statute is worded in such a manner, that they are discharged from any inrollment at all; and therefore the possession of such lands is executed from the date of the bargain and sale.

Gilb. Uses
107.

119. Although deeds of bargain and sale be publicly acknowledged and inrolled, yet they have not the sanction of records, for the private contract may be falsely and fraudulently dated, or ill executed, and therefore it is necessary they should be shewn, since the party derives his title from their commencement. The act of inrollment however is a transaction of the court, and therefore cannot be denied, unless by pleading, as in all other matters of records *nul tiel record*, and the only trial is by shewing it: but the time of inrollment which appears upon the roll cannot be controverted.

Relation
back of the
inrollment.
2 Inst. 674.

120. In consequence of the statute of Inrollments, the freehold does not pass from

from the bargainor, until the deed of bargain and sale is duly inrolled. But if the bargain and sale be inrolled within the six months, then the inrollment has such a relation to the date of the bargain and sale, that the freehold is considered in law as having passed to all intents and purposes, from the bargainor to the bargainee, immediately on the date or delivery of the bargain and sale; and therefore all incumbrances and mesne conveyances by the bargainor to a third person, made between the delivery of the deed and the inrollment, are void against the bargainee.

121. One *Sewster* being seised of certain lands in fee, by deed indented dated 7th *November*, bargained and sold the lands for money. On the 9th of the same month, he acknowledged a recognizance to another person, and on the 20th of the same month the deed was inrolled. A *scire facias* being brought upon the recognizance, the question was, whether

Mullery v
Jennings,
2 Inst. 674
Owen 90

whether *Sewster* was seised in fee the 9th of *November*, the deed not being inrolled until the 20th of the same *November*; and it was adjudged, unanimously, that *Sewster* was not seised in fee of the land the 9th of *November*, for that when the deed was enrolled, the bargainee was in judgment of law seised of the land, from the delivery of the deed. And it was resolved, that neither the death of the bargainor, nor of the bargainee before inrollment, should hinder the passing of the estate.

Dymock's
Case.
Cro. Ja.
408.
Hob. 136.
1 Inst. 147
b.
— 186.
a.
1 Vent.
360.

122. Though the inrollment has a relation for the advantage of the bargainee, to avoid all mesne incumbrances and conveyances; yet when the lands are conveyed by fine or feoffment to the bargainee himself before the inrollment, then the bargainee shall take by such subsequent conveyance. Therefore if *A.* bargains and sells to *B.* and before the bargain and sale is inrolled, the bargainor levies a fine, suffers a recovery, or makes a feoffment to *B.* The bargainee shall be in by the feoffment, fine
or

1 Inst. 671
4 Rep. 70
b.

or recovery, because when a conveyance by the common law and one by the statute concur, that by the common law, shall be preferred. But if between the making of the bargain and sale and the levying of the fine, &c. the bargainor incumbers the land, then the inrollment shall have a relation for the avoiding such mesne incumbrance in favour of the bargainee.

123. The words of the statute of inrollments only extend to estates of inheritance or freehold, and therefore a bargain and sale of lands for a term of ^{Vide infra} years need not be inrolled.

124. The second sort of conveyance ^{Covenant to} which owes its origin to the statute of ^{stand seised.} Uses, and operates without any transmutation of possession, is a covenant to ^{2 Reeves 163. 353. 518.} stand seised to uses.

125. Formerly, if a man had covenanted and agreed for himself, and his heirs, with another and his heirs, that

G . for

for a certain consideration, the other should have his lands and tenements; though the land itself did not pass for want of livery, yet the covenantee acquired the Use; and now whenever a covenant of this kind is entered into, a Use arises out of the seisin of the covenantor, and is immediately executed by the statute, in the *cestui que use*, who thereby acquires the legal estate and possession.

What words necessary.

1 Vent.

137.

2 Vent.

150.

126. The proper and technical words of this conveyance are, *covenant to stand seised to the use of A. &c.* but any other words, such as grant, bargain and sell, or assign, will create a covenant to stand seised, if it appears to have been the intention of the party to use them for that purpose.

Harrison

v. Austin,

3 Mod.

237.

Scuda-

more v.

Croffing.

1 Mod.

175. S. P.

127. A settlement was made as follows—"If I have no issue, and in case I
 " die without issue of my body lawfully
 " begotten, then I give, grant and con-
 " firm my land, &c. to my kinswoman
 " Sarah

“ *Sarah Stokes*, to have and to hold the
 “ same to the use of myself for life, and
 “ after my decease, to the use of the said
 “ *Sarah*, and the heirs of her body to be
 “ begotten” with remainders over. It
 was determined that this was a good bar-
 gain and sale.

128. A conveyance, by indenture, by
 the words give, grant, enfeoff, alien and
 confirm, without livery of seisin, will,
 in order to effectuate the intention of
 the parties, be construed to amount to
 a covenant to stand seised.

129. *George Simpson* being seised in Doe v. Simpson,
 2 Will.
 R. 22.
 fee of the lands in question, in con-
 sideration of a marriage to be had be-
 tween him and *Ann Storey*, by indenture
 between *Simpson* of the one part, and
 the said *Ann Storey* and *William Storey* of
 the other part, gave, granted, enfeoffed,
 aliened and confirmed to *Ann* and *Wil-*
liam Storey and their assigns the lands in
 question, *habendum* to the use of *Ann*
Storey for life, remainder to the heirs of
 G 2 her

her body begotten by *Simpson*, who covenanted that the lands should remain to the said uses, clear of all charges.

The marriage took effect, and soon afterwards *Simpson* became a bankrupt. His assignees seised the lands and sold it to the defendant, considering this deed as void in law, or if not, that *Simpson* was tenant in tail under it.

It was resolved by the whole court, that this deed should operate as a covenant to stand seised; although it was objected that there wanted a consideration of blood between the covenantor and *William Storey*, and that it seemed to be the intent of the parties that the deed should operate as a common law conveyance. But it was answered that the judges had always been *astuti* to construe deeds, so as to effectuate the intention of the parties.

130. A conveyance which is void as a release, may notwithstanding operate as a covenant to stand seised.

131. *Thomas*

131. *Thomas Kirby* being seised in fee ^{Roe v.} of the lands in question, executed cer- ^{Franmer} ^{2 Wilf.} tain indentures of lease and release of ^{R. 75.} them to his brother. The lease was made for a year in the usual manner. The release witnessed, that for the natural love which *Thomas Kirby* bore to his brother, and in consideration of 100*l.* paid to him by his brother, the said *Thomas Kirby* granted, released and confirmed unto his brother (in his actual possession then being by virtue of the lease for a year) *after the death* of the said *Thomas Kirby* all that close, &c. to hold the same to his said brother, and the heirs of his body lawfully begotten.

It was admitted that the release, in this case, was void as a common law assurance, because it was a grant of a freehold to commence *in futuro*. But the court was unanimously of opinion that it should be considered as a covenant to stand seised to uses.

132. in the case of a covenant to stand seised, the estate continues in the covenantor

Vin. Abr. nantor until a lawful use arises; and no
tit. Use use will arise, on account of any defect
(Z.) in the limitation of a preceding use.

*Who may
 convey by
 covenant to
 stand
 seised.*

133. A covenant to stand seised, being similar in almost every respect to a bargain and sale, it follows, that no person can depart with his lands by this mode of conveyance, who cannot be seised to a use; nor can any species of property to be transferred in this manner, which cannot be conveyed to a use.

134. A covenant to stand seised, only passes those lands whereof the covenantor is actually seised at the time of the execution of the covenant, because the use must arise out of the seisin, which the covenantor has at that time.

**Yelverton
 v. Yelver-
 ton, Cro.
 El. 401.**

135. In consequence of this principle it has been determined that where a father covenanted to stand seised of the lands which he had, and which he afterwards should purchase, to the use of himself for life, and after to his youngest son and his heirs: the father afterwards purchased

purchased lands and died, and it was determined, that those lands did not pass by the covenant, because the father had no estate or interest therein at the time.

136. A covenant to stand seised being a conveyance of a private nature, and valid without inrollment, it is essentially necessary, that the consideration should be blood or marriage, and therefore natural love and affection to a man's children, nephews or cousins, or their advancement in marriage, are the only considerations by which a Use can be raised in a covenant to stand seised.

137. *Andrew Baynton* being seised in fee of the premises in question, by indenture made between him of the one part, and *Edward Baynton*, his brother, of the other part, reciting, that as the said *Andrew Baynton* had no issue male of his body, to the intent that the same manors, &c. might descend to the heirs males of his body, and might continue and remain to such of the blood and name

Consideration.

Plow. 307

4 Reeves 355.

Sharington v. Strotton.

Plowd 300

name of *Baynton*, as in the same indenture should be named, the said *Andrew*, as well for the said causes, as for the good will, brotherly love and favour which he bore, as well to the said *Edward* his brother, as to such others of his brothers as should be named in the said indenture, covenanted and granted for himself and his heirs, that he would from thence stand and be seised thereof to the use of himself for life, remainder to the use of the said *Edward Baynton* and *Agnes* his wife for their lives, remainder to the use of the heirs male of the said *Andrew*, begotten on the body of one *Frances Lee*, and for default of such issue, to the use of the heirs male of the said *Edward Baynton*, remainder to the use of *Henry Baynton*, another brother of the said *Andrew Baynton*.

Andrew Baynton died without issue by *Frances Lee*, upon whose death *Edward Baynton* entered, and the question was, whether a Use was well raised to *Edward* upon this covenant.

It

It appears from *Plowden*, that this case was most elaborately argued on both sides, after which the court were unanimously of opinion, that the continuance of the land in the name and blood of the covenantor, and the natural love and affection which *Andrew Baynton* bore to his brothers, were considerations fully sufficient to raise the Uses.

138. A consideration of natural affection, expressed to one child, will by construction of law be extended to others.

139. A man having issue three sons, Bond v. Edmonds
covenanted in consideration of natural 2 Rol. Ab.
affection to the eldest son, to stand seised 782.
of certain lands to the use of himself for 7 Rep. 41
life, remainder to his eldest son, and the
heirs male of his body, and for default
of such issue, to the use of his second
son, and the heirs male of his body,
and for default of such issue, to the
use of his third son. This was held
a good consideration to raise a Use to
the younger son, for though the consi-
deration of natural affection was only
limited

limited to the eldest son, yet it will extend to the others.

140. With respect to the consideration of marriage, it is highly favoured, and will in all cases be sufficient to raise a use upon a covenant to stand seised; and therefore a covenant to stand seised to the use of a man's own wife, or to the use of a man's brother's wife, will be good.

Plowd³⁰⁷

141. If a man covenants in consideration of natural love and affection to his son, to stand seised to the use of his son for life, remainder to such wife as the son shall afterwards marry for life, it will be good.

Bould v. Winston.
2 Rol. 786

142. A use will arise to a wife upon a covenant, to stand seised without any consideration expressed.

143. *Robert Bedell* seised of a messuage, &c. in *Iver* and *Langley* in the county of *Bucks* in fee, by indenture between him and his wife of the first part, *James* his second

Bedell's Case,
7 Rep. 40.

second son of the second part, and *Michael* his third son, of the third part, in consideration of the natural love and paternal affection, which he had to the said *James* and *Michael*, and for their better preferment and advancement, and to the intent that the same tenements should continue in his name and blood, covenanted that he and his heirs would stand seised of the said tenements, to the use of himself for life, and after his decease to the use of his wife for life, and after their deceases, of one moiety to the use of the said *James* in tail, and of the other moiety to the use of the said *Michael* in tail. *Robert Bedell* died, and the sole question was, whether any use arose to *Elizabeth* his wife or not?—It was objected, that the wife was not within the considerations which were expressed in the indenture, and no other consideration can be averred than is contained in the deed, for the substance of the agreement was referred to the deed, and the whole ought to appear therein, and nothing is left to the averment of the parties. But it was answered and resolved, that

Crofs v.
Fausten-
ditch,
Cro. Ja.
180.

that a confideration which ftands, with the deed and, is not repugnant to it, might be well averred. Besides, admitting that another confideration than what is expreffed in the deed, could not be averred, yet in this cafe there was an exprefs confideration; for when he limits it to the ufe of his wife, for term of her life, that imports a fufficient confideration in itfelf, and there needs not any averment, for *manifefta probatione non indigent*.

144. In the cafe of a covenant to ftand feifed, a Ufe will arife to thofe who are within the confideration, but not to thofe who are ftangers to the covenantor.

Smith v.
Rifley.
Cro. Car.
529.

145. *Paul Rifley* being feifed in fee, by indenture, between him and Sir *Thomas Denton*, Sir *A. Denton*, *Thomas Rifley* his brother, and *William Withers*, covenanted and agreed with them, to ftand feifed of the faid tenements to the ufe of himfelf for life, remainder to the ufe of his wife for life, remainder to the ufe of the faid

said covenantees and their heirs, upon several trusts for his children. It was resolved that the Uses was well raised, and vested by this deed, in *Thomas* the brother, he being of the blood of the covenantor, but that no use arose to the other covenantees, they being strangers and not within the consideration.

146. Love and affection to an illegitimate son, is not a sufficient consideration to raise a Use, in a covenant to stand seised.

147. A person covenanted in consideration of natural love and affection to stand seised to the use of himself for life, remainder to his son for life, remainder to *A.* his reputed son, (who was his bastard) for life, with several remainders over, and also covenanted to levy a fine or make a feoffment for further assurance, afterwards he made a feoffment in fee to the covenantees, in performance of his covenant to the same Uses. It was determined that no Use arose to *A.* the

Sir T. Perrot's case,
22 Vin.
Ab. 199.
Dyer 374.
pl. 16.
2 Roll.
Abr. 785.

A. the bastard, by the covenant there being no consideration, nor could he take any thing by the feoffment, it being only made for further assurance.

148. The adopting a firname is not a sufficient consideration to raise a Use, in covenant to stand seised, as was resolved
 Jenk. Cent. 2. ca. 60. in Sir *Christopher Hatton's* case, who having a sister's son called *Newport*, covenanted in consideration of his changing his name to *Hatton*, that he would stand seised to his Use; and it was determined that no Use did arise, for want of consideration.

2 Roll. Ab 783. 149. Antient acquaintance or friendship do not create such a consideration, as will raise a Use in a covenant to stand seised.

150. When there is a covenant to stand seised, in consideration of natural love and affection, to a particular person, that person may aver himself to be a relation, though such relationship be not expressed in the deed.

151. *Angelo*

151. *Angelo Burt* being seised of the ^{Goodtitle} premises in question, in consideration ^{v. Petto,} of the love and affection which he bore ^{2 Stra.} 924. to *Ann* his wife, and for some provision in case she should survive him, and for settling the premises, in the manner therein mentioned, covenanted to stand seised to the use of himself and his wife for their lives, and the life of the survivor, remainder to the issue of their two bodies, remainder to the use of such person or persons, as his wife should think fit to dispose to, and for want of such disposition, to the use of the lessor of the plaintiff. The covenantor died without issue, and afterwards *Ann* the wife, in pursuance of the power, conveyed the premises to her sister. It was determined that no Use arose to the sister, as she was a stranger to the consideration, and that the lessor of the plaintiff, had a good title, 1st. Because he was named in the deed, 2d, because it was stated that he was nephew to the covenantor, and though the deed does not mention him as such, yet being expressly

preſſly named, he may aver himſelf within the conſideration.

Gilb. Uſes 152. The conſideration for which a
115. covenant to ſtand ſeiſed is entered into, muſt however be expreſſed in the deed.

A bargain and ſale and covenant to ſtand ſeiſed do not di-veſt any eſtate. 153. A bargain and ſale and covenant to ſtand ſeiſed, paſs no intereſt, but that which the perſon who executes thoſe conveyances can lawfully give; for as nothing but a Uſe paſſes by thoſe conveyances, and as no Uſe can poſſibly be greater than the eſtate, out of which it is created, it follows that where a Uſe is granted, which is greater than the eſtate out of which ſuch Uſe is to iſſue, it is merely void, and the ſtatute executes the poſſeſſion, to ſo much only of the uſe as is lawfully granted. Thus if there be a tenant for life, with a contingent remainder depending on the eſtate for life, and the tenant for life bargains and ſells his eſtate in fee, ſtill the bargainee will only have an eſtate for the life of the

Gilb. Uſes 297.
Carter 46.
Ibid. 209.
Fearn 246.

the bargainor, without any power of committing waste; and the contingent remainder will not be destroyed.

154. In the same manner if a tenant in tail bargains and sells his estate tail, in fee, it only gives the bargainee an estate to him and his heirs, during the life of the tenant in tail, and the issue in tail is not put to his formedon on the death of his ancestor, but may enter on the lands; for a bargain and sale does not work a discontinuance.

155. No uses can be declared on a bargain and sale or covenant to stand seised, but to the bargainee or covenantee, that is, lands cannot be bargained and sold to *A.* to the use of *B.* because a bargain and sale and covenant to stand seised only pass a use, and the possession is executed by the statute; now the statute only executes the first use, and not the second, so that the second use is void in law. But however the courts of equity will take notice of the second

H

Use,

Seymour's case.
10 Rep.
95. *Stapilton v. Stapilton,*
1 Atk. 2.

No uses can be declared on a bargain and sale or covenant to stand seised.

Use, and enforce the execution of it under the name of a trust.

*Lease and
release.*

¹ Inst. 48.
a. Harg.
note 3.

156. The framers of the statute of Uses foresaw, that all freehold estates would thenceforth become transferable by parol only, without any form or ceremony whatever; a clause was therefore inserted in that statute, by which all bargains and sales of freehold estates were directed to be made by a writing indented and inrolled. This provision which, if it had not been evaded, would have introduced almost an universal register of conveyances of the freehold in the case of corporeal hereditaments, was soon defeated by the invention of the conveyances, by lease and release, which sprung from the omission, to extend the statute, to bargains and sales for terms of years.

157. The nature of the conveyance by lease and release, depends very much on the effect of the species of common law

law release which enures by way of enlargement.

A release by way of enlargement operates, when the possession and inheritance are separated for a particular time, as for instance, where lands are in the possession of a tenant for years, and the person who has the reversion and inheritance releases to the tenant in possession, all his right and interest in the land ; such release is said to operate by way of enlarging his estate, and gives him a fee-simple without the ceremony of livery of seisin ; because the common law deemed it needless to give livery of seisin, to a person who was already in possession. Litt. c. 465.

158. In consequence of these principles it was not unusual in the time of *Hen.* 3 Reeves 357.

4. and *Edw.* 6. to transfer the freehold by this means. A deed of lease was made to the party intended to be the purchaser, for three or four years, and when he entered into the possession, a

release of the inheritance was given to him, and thus he became seised as completely as by fine or feoffment with livery.

159. When it was observed that the statute of Uses transferred the actual possession without entry, the idea of a lease and release was adopted. A bargain and sale was made by the tenant of the freehold, to the person to whom the lands were intended to be released.

4 Reeves
355.

This bargain and sale in consequence of the consideration, makes the bargainor stand seised to the use of the bargainee, without any inrollment, by which means the use of the term for a year, is vested in the bargainee, and then the statute transfers the possession; so that the bargainee becomes immediately capable of accepting a release of the freehold and reversion; and accordingly a release is made to him, dated the day next after the date of the bargain and sale. This is held to supply the place of livery of seisin, and so a conveyance by

by lease and release, is considered as equal to a feoffment with livery of seisin.

Fabian Philips observes, that this conveyance was “ at first only purposely ^{Treat. on the writ of capias.} contrived by Serj. *Francis Moore*, at the request of the Lord *Norris*, to the end that some of his kindred or near relations, should not take notice, by any search of public records, what conveyance or settlement he should make of his estate.”

160. By the common law a release to ^{1 Inst.} a tenant for years is not good until he ^{270.} has made an actual entry on the lands, for before entry he has only an *interesse termini*, and no actual estate or possession. But it has been already observed, that in the case, of a bargain and sale to ^{Ante f.} Uses, the necessity of an actual entry is ^{87.} taken away, by the operation of the statute of Uses, which gives the *cestui que use*, an actual estate in the lands, without any entry. However the validity of

2 Mod.
352.

Lutwich v
Mitton,
Cro. Jac.
604.
Barker v.
Keate,
1 Mod.
262.
2 —. 249.

of this conveyance was formerly much doubted, and Mr. *Noy* was of opinion that it could not be supported without an actual entry of the bargainee, on the lands. But it was determined in the court of Wards by the “ two chief justices, *Montague* and *Hobart*, and by *Tanfield* Chief Baron, that upon a deed of bargain and sale for years of lands whereof he himself is in possession, and the bargainee, never entered; if afterwards the bargainors make a grant of the reversion (reciting this lease) expectant upon it to divers uses, that it is a good conveyance of the reversion; and the estate was executed and vested in the lessee for years, by the statute; and was divided from the reversion, and not like to a lease for years at the common law; for in that case there is not any apparent lessee until he enters: but here by operation of the statute, it absolutely and actually vests the estate in him, as the Use, but not to have trespass without entry and actual possession: wherefore
“ they

“ they would not permit this point to be
“ further argued.”

161. Every person who is capable of *Who may convey by lease and release.*
being feised to the use of another, may convey his estate by lease and release,
and every species of property, that is capable of being conveyed to uses, may be transferred by lease and release.

162. An estate in reversion, expectant *An estate in remainder or reversion may be conveyed by lease and release.*
on a prior estate for years, may be conveyed by lease and release. This point *Cases and Opinions. vol. 2. p. 144.*
is fully proved by that eminent conveyancer Mr. *Booth*, in an opinion which *Inf. 270.*
has been lately printed. He admits *a.*
Lord *Coke's* position, that a release cannot work without a possession, but contends he only means that the estate upon which the release is to work, must be a vested estate, for in the same folio Lord *Coke* says.—“ If a man makes a
“ lease for years, remainder for years,
“ and the first lessee enters, a release to
“ him, in the remainder for years is good
“ to enlarge his estate;” which shews
his

his opinion to be that it is not necessary that the estate to be enlarged, should be an estate in actual possession, and that it suffices if it be a vested estate, divided from the ultimate reversion.

It is now a common practice, to convey estates in remainder and reversion, by lease and release.

A valuable Consideration is necessary in a bargain and sale for a year.

163. It has been long since observed, that no Use can be raised on a bargain and sale without some pecuniary considerations ; so that if a person executes a bargain and sale without some pecuniary consideration, no use will arise, and of consequence no possession can be executed by the statute ; by which means a subsequent release will be void. The usual way is, to express a consideration of five or ten shillings in the deed, although it be never paid, for when a consideration is expressed, no averment can be made that there was no consideration.

164. A

164. A bargain and sale was made for a year, by the words, demise, grant and to farm let, rendering a pepper corn rent, and it was a question, whether a release could operate upon it, so as to make a good tenant to the *præcipe*. Judgment was given that the word *grant* would make the land pass by way of Use, and that the reservation of a pepper corn was a sufficient consideration to raise a Use, in support of a common recovery.

Barker v.
Keat,
2 Mod.
252.
1 Freem.
249.

It should however be observed, that if the lease and release had not in this case been made, for the purpose of suffering a common recovery, which is very highly favoured in law, it would probably have been determined to be void.

165. There is no necessity that there should be any consideration expressed in the release, because it is a common law conveyance.

But not in
a release.

166. A bargain and sale was made for five shillings consideration, and afterwards

Short-
ridge v.
Lamp-

leigh. 2 wards a release was made in which no
 Ld. consideration was expressed, it was doubt-
 Raym. ed whether the lands would pass to the
 798. releasee; but Lord Ch. J. *Holt* was of
 R. T. opinion that the lands were well con-
 Holt. 621. veyed, and the consideration sufficient.

Uses may 167. A Use may be declared on a re-
be declar- lease, and it has been the constant prac-
ed on a re- tice for this last century to make all set-
lease. tlements by a bargain and sale for a year,
 and a release to Uses.

A lease 168. A conveyance by lease and re-
and re- lease will not create a forfeiture, or a dis-
lease does continuance; for as *Littleton* says, *f. 600.*
not devert “ By force of a release nothing shall
any estate. “ pass but the right which he may law-
Fearne's “ fully and rightfully release, without
4th. Edit. “ hurt or damage to other persons who
473. 1 “ have right therein after his decease.”
Inst. 328.
a.

Of declara- 169. With respect to conveyances de-
rations of rived from the statute of uses, which
Uses, of are said to operate by a transmutation
Fines and of
Recover-
ies.

of possession they derive their effect from the following principles.

Where lands are conveyed by feoffment, fine or recovery, the legal seisin and estate becomes vested by the operation of these conveyances in the feoffee, cognizee, or recoveree, by the common law ; but if the owner of the estate declares his intention that such feoffment, fine or recovery shall enure to the use of a third person, a Use will immediately arise to such third person, out of the seisin of the feoffee, cognizee or recoveree, and the statute will transfer the possession to such Use.

170. In consequence of these principles, where uses are intended to be raised upon a fine or recovery, (for feoffments are now diffused) the lands are transferred by one of those conveyances to some indifferent person, who stands in the place of the ancient feoffee to Uses, and a deed is afterwards executed, reciting that by means of a fine or recovery

covery the lands in question had been transferred to *A.* and *B.* and declaring that the fine or recovery so levied or suffered shall enure and operate, and that the cognizee or recoveror in such fine or recovery shall be seised of such land, to the use of a third person; or else a deed is first executed, reciting that a fine or recovery is intended to be levied, or covenanting to levy a fine or suffer a recovery, and declaring that those assurances when compleated shall enure to the use of a third person.

In both these cases a Use arises out of the seisin of the cognizee or recoveror, to the person to whom such Use is declared, and the statute immediately transfers to that Use, the actual possession and legal estate.

171. In cases of this kind the deeds by which the Uses of fines and recoveries are manifested, derive their effect from the statute of Uses, the legal estate being transferred to the persons named
in

in the declaration of Uses, by the operation of the statute. Where such declarations are made previous to a fine or recovery, they are called deeds to *lead* the Uses; but if made subsequent to a fine or recovery, they are then called deeds to *declare* the Uses of them.

172. Before the statute of Frauds and Perjuries, 29 Car. 2. c. 3. The Uses of a fine or recovery might have been limited, by a verbal declaration only, but it is enacted by that statute, §. 7. *Must be in writing signed by the party.*
 “ that all declarations or creations of
 “ trusts, or confidences of any lands,
 “ tenements or hereditaments, shall be
 “ manifested and proved by some writ-
 “ ing signed by the party who is by law
 “ enabled to declare such trust, or by
 “ his last will in writing, or else they
 “ shall be utterly void, and of none ef-
 “ fect.”

173. It is not however necessary that a declaration of uses should be sealed, because it does not derive its effect from
 the

the principles of the common law, and in strictness, it is not a deed, but only an instrument in writing.

What words necessary.
12 Mod.
162. 3 P.
Wms.
209.

174. It is not required in a declaration of uses, that the word Use should be inserted, as any other word or expression whereby the intention of the parties may be known, will be sufficient.

175. A will which has been revoked, may notwithstanding operate as a good declaration of the uses of a feoffment.

Huffey's
case, Moor
789.

176. A bastard was seised of a manor, which he devised by will, and afterwards he made a feoffment of the same manor, to the use of such persons, and for such estates, as he had declared by his last will. It was determined that though the will was revoked, by the feoffment, yet that it should still operate as a declaration of the uses of the feoffment.

177. In

177. In a declaration of Uses, the lands ought to be described, in the same manner, and with as much minuteness as in a lease or grant, for as lands are described in a fine or recovery, only by the number of messuages, acres of arable, pasture, &c. in the same manner as in a *præcipe quod reddat*, it is proper to have a more particular description in the deed of Uses, which is the measure that usually guides juries in ascertaining the estates comprized in a fine. And there are many instances where the court of Common Pleas has directed the description of lands in a fine, to be amended, in conformity to the deed of Uses.

178. No consideration is necessary in a deed to lead or declare the Uses of a fine or recovery; altho' in the case of a bargain and sale, or covenant to stand seised to uses, we have seen that a consideration is essentially necessary. The reason of this difference, is thus explained by Mr. *Hargrave*, " In the former case (*viz.* that of a declaration of Uses) the

No consideration necessary.
1 Inst. 123.
a. n. 8.
1 Ld.
Raym.
293.

1 Bro. Ca.
in Parl.
156.

" estate

“ estate is passed completely from the
 “ grantor or donor, without the aid of
 “ a court of equity ; and therefore it is
 “ immaterial whether the Use declared
 “ on the estate is gratuitous, or not, it
 “ being sufficient that the grantee or
 “ donee receives it, coupled with a trust
 “ or use.” But in the latter case (*viz.*
 that of a bargain and sale, or cove-
 nant to stand seised) the transaction
 “ rests in covenant or agreement be-
 “ tween the covenantor or bargainor,
 “ and the *cestui que use*, and if the cove-
 “ nant or agreement was not founded
 “ on the consideration of blood, or a
 “ valuable consideration, such as mar-
 “ riage or money ; our courts of equity,
 “ which till the 27 *Hen.* 8. had the sole
 “ cognizance of Uses, would not inter-
 “ pose to compel the performance. In
 “ fewer words, chancery would enforce
 “ Uses annexed to a perfect gift, how-
 “ ever gratuitous they might be, but
 “ not those resting on a naked contract,
 “ without even so much as the consi-
 “ deration of blood to maintain them.”

179. With

179. With respect to the deeds made prior to a fine or recovery, although they are only directory, and do not bind the estate in the land immediately, yet if such fine or recovery is afterwards levied or suffered, according to the deed, they will enure to the uses declared in such prior deed: and no averment will be admitted to the contrary, unless it be by other matter in writing.

Deeds to lead the Uses of a fine or recovery.
Countess of Rutland's case. 5 Rep. 26.
a. Cro. Jac. 29.

180. In the case of a variance between the deed and the subsequent fine or recovery, averments might formerly have been made, that the fine or recovery was intended to enure to a different use, from that declared in the deed. But where it is agreed by indenture that a fine shall be levied of certain lands, by the name of a certain number of acres to particular uses, and a fine is levied of the lands, but there is some difference in the number of acres, or the fine is levied to one only of the parties mentioned in the indenture, so that there is a variance between the inden-

Idem.
Lord Cornwallis's case, 2 Rep. 76. a.

ture and the fine, yet an averment will be admitted that the fine was levied to the use of the indentures: for the original agreement of the parties was declared by writing, and although there be some small variance, in quantity, person, time, or the like, yet the law, which in common conveyances hath great respect and regard to the intent of the parties, and to the substance and effect of their original agreement, will allow of an averment to accord the fine and the indenture, when an averment is made that there was no new consideration or agreement; but that the fine was levied to the uses contained in the indenture.

Of a second deed to lead the uses of a fine, &c.

181. Where a second deed to lead the Uses of a fine or recovery is executed previous to such fine or recovery, by which different Uses are declared, from those contained in the first indenture; and the fine or recovery is levied or suffered pursuant to the second indenture, the Uses shall be directed by such second

cond indenture; for as both declarations are in writing and under seal, and made between the same parties, they are equally authentic, and the second deed being perfumed to be founded on a new agreement, shall prevail.

182. *Ann Bowyer* being seised in fee of the manor of *Trencham*, by indentures of lease and release, in consideration of a marriage then intended between her and *Edward Morley*, and an agreement on the part of *Morley*, to settle a jointure on her of 300*l.* a year, conveyed the same to trustees, in trust for herself and her heirs until the marriage took effect, and the jointure was made, and afterwards to the use of *Edward Morley* and his heirs. The marriage took place, and soon afterwards a second deed was executed, dated 29th *January* 1665, between the said *Edward* and *Ann* of the first part, and trustees on the other part, reciting that a fine was already acknowledged and agreed to be levied in due form of law next *Hilary* term,

Jones v.
Morley,
Ld.
Raym.
287.

I 2 between

between the trustees named in that deed and the said *Edward* and *Ann* his wife, of the said manor of *Trencham*, it was declared that the same should enure to the use of the said *Edward* and his heirs. Two days after the execution of this last deed and before the fine was levied, a writing indented was executed between the said *Edward Morley* of the one part, and the said *Ann*, his wife, of the other part, whereby they both in consideration of the marriage and other good causes, did covenant, consent and agree to revoke all former grants, bargains, contracts, writings, covenants and obligations made or done between them, until the said *Edward* had performed the agreements in the said marriage settlement on his part; and that in default thereof, it might be lawful for the said *Ann* and her heirs, to enter into the said manor and land conveyed by the said settlement, without the let of the said *Edward* or his heirs.

The fine was levied *Octabis Purificationis*, which was the 9th of *February* in
that

that term. *Edward Morley* did not settle a jointure pursuant to the agreement, and *Ann* his wife died without issue. The question was, whether the fine should enure to the use of *Edward Morley* and his heirs, according to the deed of the 29th *January*, or to the use of *Ann* his wife, and her heirs, according to the deed of the 31st *January*.

The court of King's Bench were ^{1 Ld.} unanimously of opinion, that the fine ^{Raym.} did not enure to the Uses declared by ^{286 12} the deed of the 29th of *January*, but ^{Mod.} that this deed was controlled by the writing of the 31st of *January*; to prove which, Lord Ch. J. *Holt* premised three things,—

1st, If it be covenanted by deed to levy a fine of lands, &c. to such persons and Uses, and the fine is levied pursuant to the deed; no proof whatever by parol shall be admitted to prove that this fine was levied to other Uses, than those that are contained in the deed. But a subsequent

sequent deed may alter the uses of the fine, (though a parol agreement, as this writing between husband and wife is not a deed, but amounts to a parol declaration) cannot. But if there is a variance between the deed and the fine, in any circumstance, then the parties may aver the fine to be levied to other Uses.

2d, Though there is a variance between the deed and the fine, yet if nothing appears to the contrary, the fine shall be taken to be to the uses of the deed, and in that case the deed is not only evidence of the Uses, but the fine is, by construction of law, to the uses of the deed.

3d, If the fine had agreed with the deed, the Uses limited by the deed could not have been controuled by the writing of the 31st of *January*; because, though the deed of a feme covert is not valid in law, yet the deed, having relation to the fine takes validity from thence, and will conclude her.

From

From these premises his Lordship concluded, that the fine could not be to the use of the deed of the 29th of *January*, because the fine to be levied by that deed ought to have been levied the *Hilary* term next following, exclusive of that *Hilary* term in which the deed was made : but a fine was levied in the same *Hilary* term in which the deed was made, and therefore there was a variance between the fine and the deed, and consequently room left for averment ; for if the deed had been pursued, the wife would have had twelve months to see whether the husband would perform the marriage agreement, and if he would not, she might have refused to join in levying the fine, of which benefit she was deprived by its having been immediately levied. Then the husband by the writing of the 31st of *January*, agrees to the terms stipulated in the marriage settlement, and the fine was levied accordingly, from whence it manifestly appears, that the agreement contained in the deed of the 29th of *Janu-*

ary was relinquished, and the new agreement of the 31st, was designed to lead the Uses of the fine.

It was agreed by the whole court, that the writing of the 31st of *January* was a sufficient declaration of the Uses of the fine; and if it were not, yet it would be sufficient to controul the deed of the 29th, for it was there agreed, that all deeds, conveyances, &c. made in contradiction to the marriage settlement, should be null and void; then if no use could arise under the deed of the 29th, the use results to the wife and her heirs, and judgment must be given for the heir of the wife.

Sho^w. Upon a writ of error, this judgment
Parl. Ca. was affirmed by the House of Lords.
140.

183. A second deed to lead the uses of a fine or recovery, must be executed by all those who were parties to the first deed, and were concerned in interest, in order to render the first deed void;

void ; for if the second deed be only executed by some of the parties concerned in interest, and not by all of them, it will not avoid the first deed.

184. *Philip Stapleton* being tenant for ninety-nine years, if he should so long live, with remainder to trustees to preserve contingent remainders, remainder to his first and other sons, and having two sons, *Henry* and *Philip*, the father and sons, by deeds of lease and release, dated the 9th and 10th *September*, 1724, conveyed the premisses to two persons as tenants to the *præcipe* for the purpose of suffering a common recovery which was to enure as to part, to the use of *Philip* the father and his heirs, and as to another part to the Use of *Philip* the father for life, remainder to *Henry* the son for life, remainder to his first and other sons, remainder to *Philip* the son for life, remainder to his first and other sons, &c. There were covenants to suffer a recovery within twelve months, and likewise for further assurances. Before any recovery was

was suffered, *Henry* the son died, leaving issue *Henry* the plaintiff. Afterwards by lease and release, 12th and 13th *April* 1735, to which the heir of the surviving trustee, in the original settlement of 1661 was a party, *Philip* the father and *Philip* the son covenanted to suffer a recovery of the same premises, to the use (as to part) of *Philip* the father, his heirs and assigns; and as to the other part, to the use of *Philip* the father for life, remainder to *Philip* the son in fee. In *Trinity* term 1725, a recovery was suffered in which were the same tenant to the *præcipe*, the same demandant, and vouchees (except *Henry* who was dead) as were covenanted to be by the first deed. It was likewise suffered within twelve months after the execution of the first deed. It was proved in the cause that *Henry* the son, who died before the recovery was suffered, was a bastard; and the question was, whether the son of *Henry* was intitled to the premises under the declaration of Uses made in the year 1724? or whether that
 declar-

declaration was avoided by the subsequent declaration in 1725?

Lord *Hardwicke*.—The first question in this case is, whether the lease and release of the 9th and 10th of *September* 1724 will amount to a good declaration of the Uses of the recovery, notwithstanding the subsequent deed of *April* 1725? I am strongly inclined to think that the lease and release of 1724, will amount to a good declaration of the Uses of the recovery. This question depends on the construction of law, and the authority of cases upon the declaration of Uses. It is true where there is an agreement to suffer a recovery, and Uses are declared, if the recovery is afterwards suffered, though it varies in point of time from the recovery covenanted to be suffered, yet if there is no subsequent declaration to Uses, the recovery will enure to the Uses so declared; and before the statute of Frauds, if the deed declaring the Uses had not been pursued, a parol declaration of the
Uses

Uses could have been admitted; but if there was a deed declaring the Uses, and the recovery was suffered accordingly, that would, before the statute, have excluded a parol declaration of new Uses. But even now there may be a subsequent declaration of other uses, but that declaration must be in writing, and such a new declaration of uses depends upon the agreement of the parties; therefore though it was said at the bar, that the declaration of uses is in the power of the tenant in tail, and that he may declare new uses, I take that not to be law; for such subsequent declaration of uses must be by all the parties concerned in interest; and in the case of the

5 Rep. 25. Countess of Rutland, it is not laid down that the tenant in tail may declare new uses, but it is said, *whilst it is directory only, new uses may be declared*, and the meaning of that is, that as the new uses must arise out of the agreement of the parties, the parties may change the uses but that must be done by the mutual consent of all the parties concerned in interest,

interest, and in that case it was a mutual agreement of all the parties. But in the present case the second agreement not being between all the parties concerned in interest, ought not to controul the first declaration, and especially as the recovery was suffered within the time prescribed by the first deed, and between the same demandant and tenant.

185. With respect to deeds executed ^{Of deeds subsequent declaring Uses.} subsequent to the levying a fine, or suffering a recovery, it was formerly doubted, whether they would operate so as to ^{9 Rep. 2. b. 9. b.} direct the uses of such prior fine or recovery. Because where a fine was levied or a recovery suffered without consideration, the use of the land immediately resulted back to the original owner; and when the use was once vested, it was ^{Vide infra ch. 5.} doubted whether it could afterwards be divested by a subsequent declaration or agreement.

But in the following case, such a subsequent declaration was adjudged to be valid, and sufficient to declare the uses of a fine or recovery.

186. *Peter*

Down-
man's case,
9 Rep 7.

186. *Peter Vavasor* suffered a common recovery, and a deed was afterwards executed by him, in which the Uses of this recovery was declared; it was unanimously resolved, by the court of common pleas, that such indenture subsequent, was sufficient to direct and declare the Uses of the precedent recovery, against the said *Peter Vavasor*, and his heirs; it being declared by the deed, that the true intent and meaning of all the parties, at the time when the recoverers should stand seised to the Uses therein mentioned; against which express affirmation and declaration by deed indented, the said *Peter Vavasor* or his heirs, should never be admitted or received to say, that no such Uses were declared at the time of the said recovery, but that the said recovery notwithstanding the said subsequent declaration, should be construed and adjudged by force of an Use, implied by operation of law, to be to the Use of the said *Peter* and his heirs. And that the
decla-

declaration by the said deed indented, should have this operation in law against the said *Peter* and his heirs, that there was a present certain and complete agreement and declaration of the said Uses at the time of the recovery, for so the indenture expressly purports, and this stood upon good and apparent reason, for inasmuch as *Peter* and his heirs were only to take advantage for want of a declaration of Uses, reason required that the declaration of the said *Peter* by his deed indented, should stand against him and his heirs.

187. It was also resolved by the judges in this case, that where there is an indenture subsequent, declaring the Uses of a prior recovery, an averment may be made, that other uses, than those contained in such indenture, were expressed and limited before, and at the time of the recovery, and that if in this case *Peter Vavasor* had, after the recovery was suffered, conveyed or charged the lands, which conveyance or charge would

9 Rep. 10.
b. 11. a.

would be defeated, and annulled by the subsequent declaration, there such subsequent declaration, should not of itself subvert the mesne conveyance or charge, unless it could otherwise be proved that by the certain and complete agreement of the parties, the recovery was had to such uses; for by judgment of law such declaration subsequent, shall be sufficient only, where no other certain and complete declaration or limitation of any other use, either at the time, or before the recovery was made, or any mesne estate or interest was vested.

188. A deed subsequent to a recovery declaring the uses thereof may be controuled by a posterior deed of the same kind.

Vavisor's
case,
Dyer 307.
b.

189. A feme sole, having land by descent from her father, suffered a common recovery, and afterwards willed and granted by indenture between her, and one *A. B.* whom she intended to marry, that immediately after the solemnization

lemnization of the marriage, the recoverors, their heirs and assigns, should stand and be seised, to the use of the said husband and wife and of their heirs for ever, and to no other use. The marriage took effect, and afterwards the recoverors having notice of the indenture and marriage, executed by deed an estate to the husband and wife, and to their heirs in fee. After that the husband and wife by indenture, made between them and the heir of the wife on the part of her father, reciting that inasmuch as the land came to her by her father, and as she had no issue of her body, notwithstanding the purport of the indenture and conveyance aforesaid, the true intent was, that the issue of the body of the wife should inherit the land, and for default thereof, her next right heirs: It was accordingly by the same indenture fully concluded, bargained and agreed for them, and their heirs, that the husband and wife in future, should stand and be seised thereof to the use of themselves in special tail,

K

remainder

remainder to the right heirs of the wife. Upon the death of the husband, who survived the wife, a question arose on a special verdict, whether the heir of the husband, or the heir of the wife, was intitled to the land; and it was resolved by all the judges of the court of common pleas, for the heirs of the wife, because, the first indenture was corrected by the second.

190. By the statute of frauds and perjuries, 29 *Car.* 2. c. 3. It is enacted that all trusts shall be "declared in writing, "*at* and not after the time, when such "trusts were created." Which rendered void all subsequent declarations of Uses. But by the statute 4 and 5 *Ann.* It is enacted, "That all declarations or "creations of Uses, or trusts of any fines "or common recoveries manifested by "a deed, after the levying or suffering "thereof shall be as good in law, as if "the act of 29 *Car.* 2. had not been "made."

191. A

191. A deed declaring the Uses of a fine, which was executed four years after the fine had been levied, was determined to be good; the jury having found that the fine was levied, to the Uses declared in the deed.

192. In ejectment the case on a special verdict was.—*A.* and *B.* his wife ^{Bushel v. Burland. R.T. Holt} levied a fine, and four years after, they ^{733. 11 Mod.} by deed declared the Uses of it, in 156. which were the following words, “ all “ and every fine or fines levied, or to “ be levied, shall be to the Uses of this “ deed.”

The question was, whether the Uses of the fine were well and sufficiently declared by this subsequent deed.

Lord Chief Justice *Holt* delivered the opinion of the court, that the Uses were well declared, the jury having found that the fine was levied to the Uses therein declared. The court was also of opi-

nion, that notwithstanding the statute of Frauds, a subsequent deed is now as good, as it was before that statute was made.

What persons may declare uses.

193. With respect to the persons who are capable of declaring Uses, not only all those to whom the law in other instances gives a disposing power, are capable of this mode of transferring their lands ; but also some other persons who are incapacitated from conveying away their estates by deeds, deriving their effect from the common law.

Bac.R. 66.

194. It is said by Lord *Bacon* that the king may declare a use on his letters patent, though the patent itself implies a use, if none be declared.

Married women. Bac.R. 67.

195. As a married woman is allowed to join her husband, in levying a fine and suffering a recovery, and to bind herself by these modes of assurance, she is also allowed to join her husband in declaring

declaring the uses, of such fine or recovery ; for otherwise the privilege of joining her husband in a fine or recovery, would be nugatory, as the estate would immediately result to the former uses.

Busshell
Burland.
ante f. 192.
Vide infra
ch. 5.

196. If the husband alone declares the uses of a fine levied by him, and his wife, of the lands of the wife, it will bind the wife, unless her dissent appears ; for when she joined her husband in the fine, it shall be presumed that she also joined him in the agreement, respecting the declaration of uses, unless the contrary is proved.

2 Rep. 57.

197. A husband and wife joined in a fine of the wife's lands, to a purchaser, and afterwards the husband alone declared the Uses of it by articles. The question was, whether it should bind the wife. Lord *Hardwicke*, As no other deed is shewn, that declares different Uses, and the Uses declared do not vary

Swanton
v. Raven,
3 Atk. 105

vary from what the wife intended, it shall bind her notwithstanding. And therefore the bill which she has brought after an acquiescence of fifteen years, since her husband's death, for possession, on suggestion, that she is not bound by the fine, as she did not join in the articles with the husband, in the declaration of Uses, must be dismissed.

2 Rep. 57.
b.

198. If the wife alone, declares the Uses of a fine, levied by her and her husband of her land, such declaration will be void, because being *sub potestate viri*, she cannot limit the Use, without the concurrence of her husband. On the other side, the husband who has no estate in his own right, cannot declare the uses of such a fine, without the express or implied concurrence of the wife. So that the one is not *sui juris* although she has the estate, and the other is *sui juris* but has not the estate. Hence it follows that when they make different declarations, they are both void.

199. Christo-

199. *Christopher Kenne, and Elizabeth*, <sup>Beck-
with's case</sup> 2 Rep. 56.
his wife, being seised in fee, in right of
the said *Elizabeth*, an indenture was
executed by *Elizabeth*, without the con-
sent of her husband, by which the said
Elizabeth alone limited and declared the
Uses of a fine, which afterwards should
be levied. Eight years after, the hus-
band executed an indenture, without the
consent of his wife, by which Uses were
declared, different from those contained
in the indenture, executed by the wife.
The fine was afterwards levied by the
husband and wife, to the conusees men-
tioned in the indenture, executed by the
wife, and it was found that there were
no other uses declared of it.

It was determined that both the limi-
tations and declarations of the uses were
void, and that the said fine was by con-
struction of law, to the use of the wife
and her heirs.

200. It was also resolved in this case 2 Rep. 58,
that if the husband and wife agree, in^a
the

the limitation of the Use, of part of the land, and vary in the limitation of the residue, it will be good for the part in which they agree, and void for the residue.

Infants.

2 Rep. 58.

a. 10—42.

b.

Bac.R. 67.

contra 4

Leon. 89.

201. It is said by the judges in *Beckwith's* case, that if an infant levies a fine and declares the uses of it, such declaration shall bind him as long as the fine remains in force, for inasmuch as he hath been admitted by the judges, as a man of full age to levy a fine, the law, as long as the fine remains in force, will permit him to limit the use thereof. So of a man not *compos.* But as the court of chancery has in many instances compelled persons who had obtained estates under a fine, in a fraudulent manner, to reconvey them to those who were really intitled to them, so that court will interpose its authority in cases of this kind, and not suffer the declarations of uses of a fine levied by an infant, to bar his heirs: as no species of fraud can be

be more evident, than that of obtaining a conveyance, from a person of this description.

202. One *Addison*, by two inquisitions, was found a lunatic, without any inter-vals. The defendant had got a mortgage, and at last an absolute purchase, at great under-value, by deeds, fines, and recoveries. The court set aside the purchases. Addison v. Dawson, 2 Vern. 678.

203. An agreement entered into by an infant, to levy a fine and suffer a recovery when he came of age to certain uses, will not operate as a declaration of the Uses of such fine and recovery.

204. The Earl of *Ferrers* being tenant for life, with remainder to his first and other sons in tail male, and having a son who was about seventeen years old, a very advantageous match had been agreed on, between such eldest son and a young Nightingale v. Ferrers, 3 P. Wms. 207.

a young lady, and articles were entered into by Lord *Ferrers* and his son, whereby Lord *Ferrers* covenanted that he and his son should within a year after the son came of age, by fine or recovery, settle the bulk of his estate to the Use of the son for life, remainder to his first and other sons in tail, &c.

The marriage took effect, and the infant son having thus executed this deed during his infancy, afterwards came of age, and pursuant to his covenant joined with his father in levying a fine, and suffering a common recovery; but there was no declaration of Uses. The question was, whether these articles amounted to a declaration of the Uses of the fine and recovery? And it was determined by Sir *Joseph Jekyll*, that they did not.

Declarations of Uses are co-extensive with the 205. The right of declaring the uses of a fine or recovery, is precisely co-extensive, with the quantity and nature of

of the interest and estate which each of ^{estates of} the parties has in the lands. ^{the parties.}
2 Rep. 57.
b.

206. If therefore a tenant for life and Noy. 20.
the person having the remainder or re- 77. Argoll
version, join in levying a fine, or suf- v. Cheney,
fering a recovery, they may declare the Palm.
uses according to their respective inter- 405.
ests and estates in the land.

207. If there be two joint-tenants, 2 Rep. 58.
who join in levying a fine, or suffering a. Palm.
a recovery, and one declares the Use in 405.
one manner, and the other in another
manner, the same shall be good for each
of their parts, for the declaration
of the Use shall be directed and go-
verned according to their estates and
interests.

208. It is said in *Shelley's case*, *argu- Confruz-*
endo, that the construction of devises, *tion of de-*
and of estates conveyed in Use, was the *clarations*
same, *viz.* according to the meaning of *of Uses.*
the parties.—And in a case reported by 1 Rep.
101. a.
Croke,

Carter v. Croke, the court said, that a declaration of Uses should be expounded as a will.
 Ringstead.
 Cro. Eliz.
 208.

Carth. 209. In *Carthew's* report of the case of *Leigh v. Brace*, the court is stated to have said, that a conveyance by way of use had always been construed like a will, with respect to the intention of the parties, and was not tied up to the strict forms of conveyances at common law. But it is observable that although this case is more fully reported by Lord Chief Justice *Raymond* and *Salkeld*, and also in *Rep. Temp. Holt*. 668, and 5 *Mod.* 266. yet no mention is made of the court's having laid down any such doctrine. And in the case of *Makepeace v. Fletcher*, a limitation in a covenant to stand seised to the use of *Ann* the daughter of the covenantor, and the issue of her body, was determined to pass no more than an estate for life ; although it was contended upon the authority of the case of *Leigh v. Brace*, as reported by *Carthew*, that a conveyance by way of use

2 *Ld.*
Raym.
 101
 3 *Salk.*
 337.

Com.
Rep. 457.

use should be construed like a will, and therefore that *Ann* took an estate tail.

210. In the case of *Rigden v. Vallier*, where the question was, whether in a covenant to stand seised, the words, equally to be divided, created a tenancy in common. Lord *Hardwicke* is reported by Mr. *Vezey* to have expressed himself in the following manner;—“ It is ^{2 Vez.} 257.
 “ objected that there is no warrant to
 “ construe a deed to uses as to the limitations, and words of it in a greater
 “ latitude than a conveyance, by way of
 “ feoffment, or other conveyance at common law: and if construed in a different manner would cause great confusion, which I hold to be true in general, for the statute joining the estate and the use together, it becomes one entire conveyance, by force of the statute, and the words are to be construed the same way, but this is to be taken with some restriction. As to the words of limitation in a deed, they are to be sure, to be construed in that manner,
 “ ner,

“ner, viz. in the same sense ; but where
 “ they are words of regulation or modi-
 “ fication of the estate ; and not words
 “ of limitation, I think there is no harm
 “ in giving them greater latitude in deeds
 “ on the statute of uses, which are trusts
 “ at common law, than on feoffments,
 “ which are strict conveyances at com-
 “ mon law.”

3 Atk.
734.

The case of *Rigden v. Vallier* is also reported by *Atkyns*, where Lord *Hardwicke* is stated to have said, “ It would
 “ be very inconvenient to construe a
 “ covenant to stand seised, different from
 “ conveyances at common law, but here
 “ are words of regulation, or modificati-
 “ on ; and I do not see any harm in giv-
 “ ing them a reasonable construction to
 “ answer the intention.”

1 Will.
R. 341.
Sayer's R.
67.

211. In the case of *Goodtitle v. Stokes* which arose in the court of King's Bench, two years after the case of *Rigden v. Vallier*, it was determined, upon the authority of Lord *Hardwicke's* decree in
 the

the last mentioned case, that the words equally to be divided, *in a deed of Uses*, created a tenancy in common.

212. If it should be established that conveyances to uses, which are now be-^{Vide ante} f. 60. come the common assurances of the realm, were to be construed in the same manner as wills, even with respect only to the words of regulation or modification of the estate, such a doctrine would in some degree tend to introduce all that latitude, and uncertainty, which now prevail in the construction of testamentary dispositions. Of this opinion was the late Mr. *Booth*, the most able conveyancer of this century (a). And his ideas are confirmed by a modern determination of the court of chancery.

(a) " If deeds of Uses must be governed by the same rules as prevail, with respect to wills, then a limitation to a man's male descendants, or men children, may create an estate tail; and an absolute inheritance may pass by a limitation, to the Use of the grantee for ever, which will produce infinite confusion."—Cases and opinions, vol. 2. p. 279.

213. In

Stratton
v. Best,
7 Bro.
Rep. 233.

213. In a marriage settlement, lands were conveyed to trustees and their heirs in trust, to permit the husband and his assigns to take the rents and profits for ninety-nine years, if he should so long live, and after his decease, to permit the wife to take the rents and profits for life, and after the decease of the survivor of them, upon trust, to permit and suffer all and every the child and children of the marriage, to take the rents, issues and profits, in such shares as the husband shall appoint; and for want of appointment, *in trust, to permit and suffer all and every such child and children, to receive and take the rents, issues and profits of the said premisses, to them and their heirs for ever.*

The question was, whether the children of the marriage took as joint-tenant or tenants in common, the father not having made any appointment.

Lord Chancellor *Thurlow* decreed that according to the true construction of the settlement,

settlement, the estates comprised therein were to be considered as settled on the children of the marriage in joint-tenancy; subject to the power of appointment. On a re-hearing of this cause it was contended that the children took as tenants in common, upon the ground that deeds deriving their effect from the statute of Uses, are to be construed according to the intent of the parties, so as it be not contrary to law, and the case of *Rigden v. Vallier* was cited as an authority in point.

Lord Chancellor *Thurlow* observed, that the question was “whether deeds
“to uses, in the nature of wills, should
“be construed so widely as wills have
“been. I should be sorry to give into
“this, for I think no good has been
“done by the wide construction of
“wills.”

The case stood over to amend the pleadings. When it came on again, his Lordship said, “that whether the settle-
“ment was to be considered as a con-

L

“veyance

“ veyance of a legal estate, or a deed to
 “ Uses, would make no difference. He
 “ therefore continued of his former opi-
 “ nion.”

*Whether a
 devise op-
 erates by the
 statute of
 Uses.*

1 Inst.
 271. b.
 note 1.

214. It is a matter of doubt whether
 a devise under the statute 32 Hen. 8. can
 operate by means of the statute of Uses.
 The late Mr. *Booth* was of opinion that
 it did not. The question is fully and
 ably discussed by Mr. *Butler*, in his notes
 to the 15th edition of the First Institute,
 who concludes his observations on that
 subject with the following words. “ But
 “ whether a devise to uses operates solely
 “ by the statute of wills, or by that
 “ statute jointly with the statute of Uses,
 “ is, except in a very few cases, a matter
 “ rather of speculation than of use; as
 “ it is now settled, that an immediate
 “ devise to uses, without a seisin to serve
 “ those uses, is good; and that where
 “ the estate is devised to one for the be-
 “ nefit of another, the courts execute
 “ the use in the first or second devisee,

as

“ as appears to suit best with the intention of the testator.

215. in cases of conveyances to uses To whom the title deeds belong. under the statute, it is said that the possession of the deeds appertains to the feoffees, and not to the *cestui que use*; 1 Inst. 6. a. note 4. because the possession of the deeds originally belonged to the feoffee to Uses, in order to enable him to defend the title of the land; and although the statute of Uses transfers the legal estate to the *cestui que use*, yet it does not transfer the deeds; but this doctrine seems very questionable, as feoffees to uses have now only a seisin of an instant, and are never called upon to defend the land. And it seems reasonable to suppose that where a statute transfers the legal seisin of lands from one person to another; it should also transfer the title deeds of such lands, as they must be totally useless in the hands of a person who has no connection with the estate.

CHAPTER V.

Of contingent, and resulting Uses.

*Different
kinds of
contingent
Uses.*

216. **T**HE manner in which Uses limited to arise immediately, upon the execution of a conveyance to Uses, are executed by the statute 27 *Hen.* 8. has been explained in the last chapter. But Uses are frequently limited to arise, on the happening of some future uncertain event, in which case they are called contingent Uses. Of these there are four kinds. 1st, Uses limited to persons uncertain, or to arise on the happening of some uncertain event, to take effect upon the determination of some preceding estate of freehold. 2d, Uses limited to arise upon the happening of some uncertain event, without any preceding estate of freehold, which are called springing Uses. 3d, Uses limited so as to change from one person to another, upon the happening of some future

ture event, which are called, shifting or secondary uses. 4th, Uses arising upon the execution of powers.

217. With respect to uses limited upon a preceding freehold estate, to persons uncertain, or to arise on the happening of some uncertain event: If a person covenants to stand seised, to the use of *A.* for life, remainder to his first, and other sons in tail, (*A.* having no son at the time) remainder to *B.* in tail, remainder to the covenantor in fee, a use immediately arises out of the seisin of the covenantor to *A.* for life, and to *B.* in tail, which are immediately executed by the statute, because in this case there are persons seised to a use, a *cestui que use*, and a use in *esse*; but with respect to the contingent uses limited to the first and other sons of *A.* they cannot possibly be executed, because there are no *cestuis que use in esse*. The moment *A.* has a son, a use, in tail arises to him, out of the seisin of the covenantor, who has the reversion in fee, of the legal

*Contingent
Uses limited
upon a
preceding
estate.*

*Wegg v.
Villers,
infra.*

legal estate in him, and the statute executes the legal estate to such first son, who becomes tenant in tail in remainder of the legal estate, expectant on the determination of *A.*'s life estate.

*Contingent
uses of the
same kind
raised by
transmu-
tation of
possession.*

218. When the conveyance operates by transmutation of possession, as in the case of a fine, recovery or release to uses, other principles have been adopted, to support contingent uses, limited to arise on the determination of a preceding estate of freehold. Thus if lands are conveyed to trustees and their heirs, by fine, recovery or release, and it is declared that they shall stand seised to the use of *A.* for life, remainder to his first and other sons in tail, (*A.* having no sons at the time) remainder to *B.* in fee; in this case the use for life limited to *A.*, and the use in remainder limited to *B.* are immediately executed by the statute, and converted into legal estates; because there are persons seised to a use, a *cestui que use*, and a use *in esse*. But with respect to the contingent uses limited

mited to the first and other son of *A.* they cannot possibly be executed, because there is no *cestui que use in esse*. Whenever *A.* has a son, then there is a *cestui que use in esse*, a use therefore vests in such son in tail, and the statute transfers the legal estate to that use. But as no use can be executed by the statute, unless there is some person seised to such use, it was much doubted in *Chudleigh's* case, which was the first that ever^{1 Rep.} arose upon this point, who it was that^{120.} was seised to the use of the first son of *A.* at the time of his birth. Some of the judges held that the first seisin of the feoffees was sufficient to feed all the future and contingent Uses, which were in abeyance until the contingency happened, on which they were to arise, and therefore that they were extinguishable by the alienation of the tenant for life. But the majority of the judges were of opinion, that until uses are executed, they remain as they were before the statute, and that upon a conveyance to uses, there is no actual seisin left in the feoffees,

2 Rep.
129. b.
137 a. 1
Inst. 271.
b.

Dyer 340.
b.

feoffees, but that as to all Uses *in esse*, and which vest immediately, the seisin is presently transferred to the *cestui que use*; and as to the contingent Uses there is no present seisin existing any where. But as the statute of Uses transfers the possession, in the same manner and to the same extent, as the Uses are limited, there remains a possibility of a seisin in the feoffees or releasees, or as *Dyer* expresses it—*adhuc remanet quædam scintilla juris, et tituli quasi medium quid, inter utroque status, scilicet illa possibilitas futuri Usus emergentis, et sic interesse et titulus, et non tantum nuda auctoritas, seu potestas remanet.*—This possibility of entry or *scintilla juris*, was deemed sufficient to support the contingent Uses, when they came *in esse*, and takes effect when these contingencies happen, on which the Uses are limited to arise, so as then to give to the feoffees, a sufficient seisin to serve those Uses, that they may be executed by the statute.

219. The absolute necessity of supposing some person to be seised to a use, before it can be executed by the statute, was the reason for adopting the doctrine of a possibility of entry or *scintilla juris* in the releasees. The framers of the statute of Uses do not seem to have had contingent uses in contemplation, when they penned the act, otherwise they would probably have inserted some clause respecting them; and when a case of contingent uses arose, they found themselves under an absolute necessity of recurring to this fiction, in order to support contingent uses. For if the judges had not adopted this doctrine, they must have allowed the seisin of the last *cestui que use*, to have been sufficient to support a contingent use, when it came *in esse*, which would be raising an use upon an use; or else they must have determined, that the land should remain for ever liable to the uses, to which it was conveyed, into whose hands soever it might come; which would be a bar to the free alienation

tion

tion of property, and might tend to create a perpetuity.

How contingent uses raised without transmutation of possession may be destroyed.

220. With respect to the manner in which contingent uses limited, upon the determination of a preceding estate or freehold, may be destroyed, a distinction must be made between those uses which are raised upon conveyances operating without transmutation of possession, and those which are raised by such a transmutation.

As to the first, we have seen that where contingent uses are created by a covenant to stand seised, or bargain and sale, the seisin of the covenantor or bargainor supports or feeds the contingent use, when it comes *in esse*. And if in a case of this kind, the covenantor or bargainor conveys away his estate, before the event happens on which the contingent use is limited to arise without consideration, or with notice of the uses, such a conveyance will not destroy the contingent uses, because it will not devest

deveft the feifin out of which they are to arife; for the grantee of the reverfion will come in, in privity of eftate, and will therefore take the land fubject to the uſes. But if the covenantor or bargainor makes a feoffment of the land, with livery of feifin, before the contingent Uſes arife, they will be deſtroyed, becauſe the feifin out of which they are to arife, will be thereby deveſted.

221. Sir *Edward Coke* covenanted to ſtand ſeiſed of certain lands, to the uſe of himſelf for life, remainder to the uſe of his wife for life, remainder to the uſe of his daughter for life, remainder to the uſe of the firſt and other ſons of his daughter in tail male, with the reverfion in fee to himſelf. Some time after this ſettlement was made, Sir *Edward Coke*, by deed, reciting the ſettlement, granted his reverfion in fee to a ſtranger, without conſideration; and ſoon after he made a feoffment of the lands, with livery of feifin. After the death of Sir *Edward Coke*,

Wegg v. Villers 2 Roll. Abr. 769.
2 Sid. 64. S. C. by the name of Heyn v. Villers.

Coke, his wife entered and died seised having survived the daughter. A question arose, whether the contingent use which was limited to the first son of the daughter, was destroyed or not by Sir *Edward Coke's* grant or feoffment.

After great consideration it was resolved, that the grant of the reversion did not destroy the contingent Use, for as it was made without consideration, and the Uses of the settlement were recited in it, there was both privity of estate, and confidence in the person, so that the grantee of the reversion stood seised to the former Uses.

As to the feoffment, it was agreed that it divested the estate, and seisin of the grantee of the reversion, together with the estates of the wife and daughter; but when the wife entered after the death of Sir *Edward Coke*, she thereby reinstated all the divested estates, and among the rest, the estate and seisin of
the

the grantee of the reversion, which was the estate and seisin, that was to serve the contingent uses. If the feoffment had been made before the grant of the reversion, the contingent uses would have been totally destroyed, for the only seisin that could support them, was that of Sir *Edward Coke*, which he had already conveyed by his grant to another person, by which means he debarred himself, from the power of destroying the contingent uses. But if he had not departed with that seisin, until he had made the feoffment, then the contingent Uses must have been totally destroyed, as no entry by his wife or daughter could have revested the original seisin, of Sir *Edward Coke*, nor could he himself have entered against his own feoffment.

Sir *Edward Coke* was compelled to make this settlement by an order of the council, but that he might have the power of preserving or defeating the contingent

Cart. R.

202.

Gilb. Uses

194.

contingent uses, he made this grant and feoffment, with an intention, in case he chose to preserve the contingent uses, to destroy the feoffment and produce the grant; but if he thought proper to defeat the contingent uses, then to destroy the grant, and produce the feoffment, but death prevented him from carrying this ingenious scheme into execution.

How contingent uses raised by transmutation of possession may be destroyed.

222. With respect to the manner in which contingent uses, raised by transmutation of possession, may be destroyed, we have seen, that in cases where the estate is transferred to feoffees or releasees, the contingent uses limited upon such conveyances, are supported by the doctrine of a possibility of entry or *scintilla juris* existing in the feoffees or releasees to uses. But this possibility of entry or *scintilla juris* must continue undisturbed, until the event happens, on which the contingent use is to arise; for if the preceding estates are divested before the event happens, then the possibility

bility of entry or *scintilla juris*, of the feoffees or releasees to uses is destroyed, as well as the other estates; and there being no seisin to the contingent Use when the event happens, on which it is limited, it can never arise, unless such possibility of entry or *scintilla juris*, is re-vested.

223. It follows from this doctrine that where particular estates limited by way of Use, are divested and turned to a right, all subsequent contingent uses are thereby destroyed, unless some of the persons intitled to the preceding particular estates, or the feoffees to Uses, or their heirs, make an actual entry, in order to re-vest the particular estates, for otherwise the possibility of entry or *scintilla juris* of the feoffees to Uses, being divested, no seisin will exist to the contingent use, when it arises, and consequently the statute cannot transfer the possession.

224. Sir

Chud-
leigh's
case.
1 Rep.
120. Poph.
70.

224. Sir *Richard Chudleigh* enfeoffed several persons of his estate to the use of the feoffees and their heirs, during the life of *Christopher Chudleigh*, his eldest son (who had killed a gentleman and fled to *France*) remainder to the use of the first and other son of his eldest son in tail

Before the eldest son had a child born, the feoffees enfeoffed him of the lands in question, in fee-simple. It was determined by a majority of the judges in the Exchequer Chamber, that this feoffment divested all the subsequent estates, and destroyed the contingent uses, limited to the first and other sons of *Christopher Chudleigh*; for although it was made without any consideration, and to a person who had notice of the uses; yet as the feoffees gained by this feoffment a new estate by wrong, which they transferred to *Christopher Chudleigh*, the privity of estate was thereby destroyed, and their seisin divested, so that there was no person seised to the contingent use when it arose.

225. A man made a feoffment in fee, ^{Anon. 2} to the use of himself for life, and after- ^{Leon. 178.} wards to the use of his first son and his ^{3 Leon.} heirs. The father and the feoffees be- ^{252. 4} fore issue born, for money enfeoffed, ^{Leon. 233.} J. S. and his heirs of the lands, who had no notice of the former Use. No judgment was given in this case, but the majority of the judges appear to have been of opinion, that the use limited to the first son was destroyed ; for without an entry by the feoffees, it could not arise, and was therefore gone by their livery.

226. One of the principal objects of the judges, in *Chudleigh's* case, was, to construe contingent uses, limited upon a preceding estate of freehold, according to the same rules, and to make them liable to be destroyed in the same manner as contingent remainders, limited by common law conveyances. And they so far succeeded, that the only difference between a contingent remainder and a contingent use, limited upon a preceding estate of freehold is, that a

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right

right of entry alone is sufficient to support a contingent remainder, whereas if a contingent use be suspended, there must be an actual entry by some person having a preceding estate, or by the feoffees, or releasees to uses in order to re-vest the possibility of entry or *scintilla juris* of the feoffees or releasees to uses.

4th Edit.
p. 435,
442.

This doctrine has been questioned by the late Mr. *Fearne*, in his Essay on Contingent Remainders: But however just his observations may appear, yet as the

Biggot v.
Smith,
Cro. Car.
102. S. P.

authority of the preceding case has never been contradicted, the law must be taken as it is here stated.

Of spring-
ing and
shifting
Uses.

1 Rep.
130. a.
134. b.
138. a.

227. Soon after the statute of Uses, and even so late as 31 *Eliz.* it was laid down by *Popham* Chief Justice, in *Chudleigh's* case, that no limitation of a Use, which was contrary to the rules, established by the common law, respecting the limitations of legal estates, should be executed by the statute; for otherwise all the mischiefs intended to be remedied by

by the act, would be continued, or greater introduced. But this idea was soon departed from, and advantage was taken of an expression in the statute of uses, in order to support several of those limitations, which had been allowed by the court of chancery, in declarations of uses, when they were distinct from the legal estate.

228. The statute of uses enacts that the estate of the feoffee to uses, shall be in the *cestuis que use*, “after such quality, “manner, form and condition, as they “had before in or to the use, confidence “or trust that was in them.” Now the court of chancery having permitted a limitation of a use for life, or in tail, to arise *in futuro*, without any preceding estate limited to support it; and also a use to change from one person to another, by matter *ex post facto*, though the first use were limited in fee; the courts of law in process of time admitted of limitations of this kind, in conveyances to Uses, and determined

that in such cases, the statute would transfer the possession to the *cestui que use*, in the same quality, form and condition, as he had the Use.

*Springing
Uses.*

229. With respect to Uses limited to arise *in futuro*, without any preceding estate limited to support them, which are usually called Springing Uses, the first case in which a limitation of this kind was allowed, appears to have been determined in 10 *Eliz.* and is thus reported by *Dyer*.

Mutton's
case, *Dyer*
274. b.
Moo. 96.

J. M. being seised of certain lands in fee, levied a fine thereof, and by indenture, declared the use of it to be to himself and such wife, and wives as the said *J. M.* should happen afterwards to marry, by whatever names she or they might be called, for and during their natural lives, and the life of the survivor of them, with divers remainders over. Afterwards the said *J. M.* took to wife one *A.* and then died. Whether she should take any thing by the said

said indenture, and fine, or not, was the question. And by the opinion of *Wray* and *Mead* Serjeants, and *Plowden* and *Onslowe* she did; and thereto they subscribed their names.

230. The next case that arose on this point was in 37 and 38 *Eliz.* And is thus reported by *Croke*.

A person made a feoffment, and it was declared by indenture, that it should be to the Use of himself and *A.* his wife, that should be, after their marriage, and of the heirs of their bodies; and he took *A.* to wife.—Whether she should take by the limitation of this Use, was the question. *Coke*, Attorney General, contended that she should not, for presently by this feoffment, the fee was in the husband, by the possession executed to the Use, which he had before the marriage, which could not after the marriage, be divided, and made an estate tail in him, for he had the fee in him until the marriage, for it might have been that

Woodkiff
v. Drury.
Cro. Eliz.

439

that the marriage had never taken effect and that would have confounded the other Use; and Uses *in futuro* could not rise upon such future acts, for then an use would rise out of an use. But all the Justices held, that although he be seised in fee, in the mean time, as in truth he was, yet by the marriage the new use should arise and vest, if there were no act in the mean time to destroy that future use.

Vide
Brent's
case, *infra*.

Salk. 675. 231. It is said by Lord Chief Justice
12 Mod. *Holt*, that a feoffment to the use of *A*.
39. R. T. and his heirs, to commence four years
Holt. 731. from thence, was good as a springing
use, and that the whole estate remained
to the feoffor, in the mean time.

*Shifting or
secondary
Uses.*

232. With respect to Uses limited so as to change by matter *ex post facto*, which are usually called shifting or secondary Uses, the following is the first case in which the validity of a limitation of this kind was discussed,—

A man

A man made a feoffment in fee to the use of *W.* and his heirs, until *A.* paid 40*l.* to *W.* and then to the use of *A.* and his heirs; *A.* paid the 40*l.* Some of the judges said, that if *A.* entered he would become *ipso facto* seised in fee, for *W.* being seised in fee, by the statute of uses, *A.* would be able to divest that fee and transfer it to himself, upon performance of the condition. Others were of opinion, that the payment of the money, and the entry of *A.* had no effect, without an entry by the feoffees; and then *quacunqve via data*, the entry would be good, and *A.* would become seised according to the terms of the deed. To this it was added, that a Use might change from one person to another, by some act or circumstance *ex post facto*, as well since as before the statute.

Bro, Ab.
tit. Feoff.
al'Use, pl.
30. 6 Ed.
6.

233. It is observable that this case was prior to that of *Chudleigh*, so that the doctrine of a possibility of entry, or *scintilla juris*, was not then established. But since *Chudleigh's* case it is settled,
that

1 Rep.
137. a.

that all contingent uses must arise out of the feisin of the covenantors, feoffees or releasees to uses, and not out of the feisin of any prior *cestui que use*. Thus it is laid down by four of the judges in *Chudleigh's* case, that if *A.* enfeoff *B.* in fee to the use of *C.* and his heirs, with a proviso that if *D.* pay *C.* 100*l.* that *C.* and his heirs shall stand seised to the use of *D.* and his heirs, this is utterly void; for the future use ought to be raised out of the estate of the feoffee, and not out of the estate of the *cestui que use*.

Earl of
Kent v.
Stewart,
Cro. Car.
358.

234. *A.* levied a fine of the manors of *D.* and *S.* and declared the uses by deed, as to the manor of *D.* to the use of *B.* and his heirs, and as to the manor of *S.* to the use of his wife, remainder to the use of his heirs until *B.* or his heirs were evicted, by the wife of *A.* of the manor of *D.* and after such eviction to the use of *B.* and his heirs. It was agreed that this was a contingent use in the manor

manor of *S.* so that a use would arise to *B.* whenever an eviction happened.

235. Every modern marriage settle-
ment contains a variety of springing
and shifting uses. Thus where the
intended husband, in consideration of
the marriage and portion, conveys his
estate to trustees and their heirs, to the
use of himself and his heirs, until the
marriage is solemnized, and from the
solemnization thereof to the use of him-
self for life, remainder to his wife for
life, remainder to trustees to preserve
contingent remainders, remainder to his
first son, and the heirs male of the body
of such son, remainder to all the other
sons severally and successively, in the
same manner, remainder to all the daugh-
ters of the marriage, in tail, as tenants
in common &c. in this case the intended
husband is seised in fee until the mar-
riage, on that event, his estate in fee
ceases, and a new use springs up to him,
for life only, with several contingent
uses. On the birth of a son, that son
becomes

Mr.
Booth's o-
pinion at
the end of
Shep.
Touch.

becomes tenant in tail in remainder, and on the birth of every other son, a use in tail springs up to him; on the birth of a daughter, a use in tail in remainder vests in her, on the birth of another daughter, the last remainder in tail opens, and both daughters become intitled to a tenancy in common in tail in remainder.

Idem

In settlements made on the younger sons of noble families, there are provisos frequently inserted, that if the family estate and title descends to the younger son, the estate limited to him shall cease, as if he were dead without issue, and the estate shall go over to the person next in remainder, which is a shifting or secondary use (a).

*How
springing
and shift-
Uses may
be destroy-
ed.*

236. With respect to the manner in which springing and shifting Uses may

(a) The nature of these provisos, and the manner in which they are now framed are fully and ably explained by Mr. *Butler*, in his note to 2 *Co. Lit.* 327, a.

be

be destroyed, as there must be a seisin to every contingent use, when it arises, or a possibility of entry, or *scintilla juris* in the feoffees or releasees to uses, it follows, that if such seisin or possibility of entry is divested before the event happens, on which the springing or shifting use is to arise, it will be destroyed.

237. If therefore a person in consideration of an intended marriage, covenants to stand seised, or conveys his estate to trustees, to the use of himself and his intended wife for life, remainder to the first and other sons of the marriage in tail; and before the solemnization of the marriage he makes a feoffment in fee, or a lease for life, upon a valuable consideration, to a person who has no notice of the settlement, the uses limited to arise upon the marriage will be destroyed; because the seisin out of which they were to be derived, was divested by the feoffment, or lease for life.

238. A

Brent's
case, 2
Leon. 14.
Dyer 339.
b.

238. A person made a feoffment, to the use of *D.* his wife for her life, and in case the feoffor should survive his said wife, then to the use of him and such person as he should happen to marry, for their lives, remainder to a stranger in fee. The person in remainder, together with the feoffees, by the consent of the feoffor, made a feoffment of the lands to new feoffees, and to other uses, and the feoffor levied a fine to the new Uses. *D.* the wife of the feoffor died, and afterwards he married a second wife and died. The second wife entered, claiming under the first feoffment. *Mounson* and *Harper* were of opinion, that her entry was lawful, but *Manwood* and *Dyer* contended, that the contingent Use limited to her by the first feoffment, was destroyed by the second feoffment and fine; because the Poph. 76. seisin of the first feoffees was thereby divested.

239. Where future Uses are limited, and Gilb. Uses the freehold is not conveyed away, but only
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only a term for years created, or a rent granted, the future Uses will not be destroyed, because the seisin out of which they are to arise is not divested: but such lease or rent will bind the future Uses.

240. Sir *John Russell* covenanted by indenture, in consideration of a marriage to be had between him and Lady *Russell*, to stand seised to the use of himself and his heirs, until the marriage, and after to the use of himself and Lady *Russell*, and the heirs of his body, with remainders over. After the execution of this deed, but before the marriage, Sir *John Russell* made a lease of the lands for thirty-one years, to commence from the determination of a former term. The marriage took effect, and upon the death of Sir *John Russell*, his widow entered. The question was, whether her entry was lawful or not?

Wood v
Reignold.
Cro. Eliz.
764. 854.

Tanfield—"The point is double: 1st.
" Whether the lease shall destroy the fu-
" ture

“ ture use? 2dly, If it shall not destroy
 “ it, Whether it shall not bind the fu-
 “ ture use? For it ought to arise out of
 “ the estate which the covenantor had
 “ at the time of the covenant, which
 “ estate ought to continue without al-
 “ teration, till the time that the use
 “ shall arise, which is not here, for this
 “ is a term in reversion. To the se-
 “ cond, this lease, made upon good con-
 “ sideration, before the use did arise,
 “ shall bind it, for the use shall not
 “ otherwise be executed, than if it had
 “ been at the common law. And a lease
 “ made *bona fide* to one who had not
 “ notice thereof, shall bind it.

Popham—“ The statute executes uses
 “ only *in esse*, and not any contingent
 “ uses, until they happen *in esse*; then
 “ this use was merely void until mar-
 “ riage, for there was not any new es-
 “ tate in him; and if he, after that co-
 “ venant, had made a feoffment, or a
 “ gift in tail to one who had not any
 “ notice thereof, it would questionless
 “ never

“ never have arisen. And as at the
 “ common law feoffees might destroy
 “ Uses *in esse*, so now may he out of
 “ whose estate a future use is to be raised;
 “ ed; for the freehold is destroyed, out
 “ of which it should arise. And whether
 “ the lease for years should altogether
 “ destroy the arising thereof it is not
 “ in this case material; but clearly, it
 “ shall bind the contingent use: and so
 “ resolved in *Strangewicke’s* case. And
 “ at the common law it is clear, that
 “ the *cestui que use* shall not avoid such a
 “ lease made by the feoffees upon a good
 “ consideration, no more than a contingent
 “ use at this day.”

Fenner agreed, “ that if a freehold
 “ be conveyed to one upon consideration,
 “ the future use shall not arise;
 “ for there is not any person seized to
 “ that use when it should arise. But
 “ this lease will not destroy nor hinder
 “ it; for the same freehold remains, and
 “ the Use is annexed to the lease,
 “ and

“and therefore the lease shall not disturb nor bind it.”

Clench agreed with him for this last reason ; but it was adjourned.

Cro. Eliz.
854.

The case was again argued in 43 & 44 *Eliz.* and *Gawdy*, *Popham*, and *Clench* held, that the lease made (whereout the use did arise) was good, and should bind the future use, as a lease by feoffees made upon good consideration, shall bind *cestui que use* at the common law. But it shall not destroy the whole future use, but shall stand for the freehold, because the seisin is not changed. And *Popham* said, that he had conferred with divers of the other justices, at *Serjeant's-Inn*, who agreed in this opinion. But *Fenner*, *e contra*, Because the lease did not disturb the freehold: when the use is executed, this shall relate to the limitation and shall bind all mean acts, and therefore shall not bind the feme as to her jointure ; wherefore it was adjourned.

241. Sir

241. Sir *Henry Winston* covenanted by indenture in consideration of natural love and affection to *William Winston* his eldest son, to stand seised, to the use of his said son for life, remainder to such wife as he should marry, for life, remainder over. Afterwards the said *William Winston*, being unthrifty and in *Gloucester* jail, Sir *Henry Winston* to disturb the rising of the use to the woman whom he should marry, made a lease of the land for 1000 years to his younger son. *William Winston* married the jailor's daughter, and died without issue: and the question was, whether this lease was good against his widow.

Bould v. Winston,
Cro. Jac.
168.

Croke reports the court to have been of opinion, that the lease should not bind the estate of the wife, because there was a good estate, by the first limitation, which if not destroyed, could not be charged nor incumbered, after it was raised; for it had relation to the first covenant, and none had interest to charge it. And that the lease should not

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destroy

destroy it, but must be construed to arise out of the reversion, which Sir *H. Winston* had, and might lawfully charge.

Noy R. *Noy* who has reported this case by the
 122. *Gilb.* name of *Bolls v. Winton*, says the court
Uses, 138. thought the lease for years, did not hinder the raising of the contingent use; but that the lease in this case took effect as a future interest, out of the fee, that was in the covenantor, after the estate determined. And at the worst the wife should have the reversion and rent, during her life.

Uses arising on the execution of powers. 242. By the rules of the common law, no restriction or qualification could be annexed to a conveyance of lands, except a condition.

1 Inst 237. a. Gilb. Uses, 140. In consequence of this principle, a fine or feoffment with a power of revocation annexed to it, was void at common law; because the fine or feoffment transferred the whole property and right of

of disposal to the cognizee or feoffee, and therefore the power of revocation was repugnant to the force of the preceding words. And the admission of such a clause, would have introduced a double power, vested in different persons over the same thing, which was contrary to the principles of the common law.

243. We have however seen that before the statute of Uses, if a feoffment was made to Uses, the feoffor might reserve a power, either to himself or to some other person, to revoke the limitation of the Uses declared on the feoffment, and to appoint the feoffees to stand seised to other Uses. For the principle on which Uses were originally founded, being, that the feoffee to Uses was bound in conscience, to pursue the directions of the feoffor, this obligation was equally binding, whether the agreement was, that the feoffee should receive the rents and profits himself, or some stranger, or whether they were

to be paid in such manner as the feoffor or any other person, to whom he delegated his power, should at any future time appoint.

1 Inst.
237. a.

Booth's
Op.
Shep.
Touch.

244. The statute of Uses vests the legal estate in the *cestui que use*, in the same manner as he had the Use, from which the courts concluded that in all conveyances to Uses, a power might be reserved of revoking a former limitation of a Use, and appointing a new use to some other person. Mr. *Booth* has therefore very properly classed estates arising upon the execution of powers, under the head of contingent Uses. And as powers of this kind were soon found to be much more convenient than conditions, they were generally introduced into all family settlements.

245. Thus, if a person conveys his estate to trustees, by lease and release, fine or recovery, to the Use of himself for life, remainder to his first and other sons in tail, and inserts a proviso that

it

it shall be lawful for him, at any future time to revoke these Uses, and to declare new ones, and that immediately upon such revocation, and new declaration, the trustees shall stand seised of the lands to the use of such persons as the settlor shall appoint; this is a power of revocation and appointment; and as soon as it is executed, the Uses originally limited cease, and a new Use immediately arises out of the seisin or *scintilla juris*, of the releasees, &c. to the person named in the appointment, for such estate as is given him by the appointment, and the statute transfers the legal estate to such appointee, who by that means acquires the actual seisin and possession.

246. If a person limits his estate to such Uses, as he shall appoint, and in the mean time, and until such appointment, to the Use of himself and his heirs, the settlor has a qualified and determinable fee, until by an exercise of the power of appointment, an Use vests in the person to whom it is appointed, or till,

1 Inst.

216. b.

till, by the death of the settlor, without exercising his power, the exercise of it becomes impossible. If the settlor makes an appointment, a new Use springs up, and vests in the appointee; the fee originally limited to the settlor ceases, and the Uses appointed under the power take effect in the same manner, as if they had been inserted in the original deed, in the place of the power,

247. It follows from these principles that an appointment operates under the statute of Uses, not as a conveyance of the land, but as a substitution of a new Use, in the place of a former one.

*Within
what time
contingent
Uses must
arise.*

248. When it was established that springing and shifting Uses, might be created, to arise upon or after a limitation in fee, it became necessary to ascertain the time when such Uses should become vested; for otherwise springing and shifting Uses, might be limited on such remote contingencies, as to create perpetuities, or unalienable estates, which
our

our laws have at all times been particularly careful to prevent.

249. It is therefore now fully established, that if an estate in fee-simple is first limited, the event on which the springing or shifting use is to arise, must in its original limitation be such, that it must either take place, or become incapable of taking place, within the space of one or more life or lives in being, and twenty-one years, and a few months.

250. Thus if there be a limitation to *A.* and his heirs in fee-simple, a proviso limiting the estate to *B.* if *A.* dies without leaving issue, living at his decease; or if *A.* and *B.* both die without issue living at the decease of the survivor of them; or if *A.* has no child who attains the age of twenty-one; or if neither *A.* nor *B.* have a child who attains the age of twenty-one, is a good proviso; for each of these events is such, that it either must happen, or become incapable of

of happening within the period above-mentioned. But for the same reason such an executory proviso would be bad, if limited to take effect after an indefinite failure of issue, of *C.* a stranger, as that event might not either happen, or become incapable of happening, till long after the period of which we are speaking.

251. It is otherwise with respect to contingent Uses, which are limited upon, or after, an estate-tail; these may be limited to take effect, at an indefinite period of time, without any regard to the rule above stated; hence, though as we have just observed, if an estate is limited to *A.* in fee-simple with a proviso that it shall go over to *B.* if *C.* a stranger dies without issue, the proviso is void, as the event of *C.*'s dying without issue may not take place, till long after the expiration of the period in question. Yet if an estate is limited to *A.* in tail or to *A.* for life, remainder to *B.* in tail, or to *A.*'s first and other sons in tail, a similar

lar limitation over to a stranger, to take place on C.'s dying generally without issue, would be good.

Such is the proviso frequently inserted in settlements, where after a limitation of several uses in strict settlement, a clause is inserted, for shifting the estate, to another branch of the family, on the event of another estate ever coming to any of the persons to whom the settled estate is limited; an event which by possibility may not happen for many centuries, and then actually take place.

252. The reason of this is, that where an estate in fee-simple is created, with a limitation engrafted on it, in the nature of a springing or shifting use, neither a fine, recovery, nor any other act of the first taker, will defeat the second limitation. But it is otherwise in the case of an estate tail; a recovery suffered by the tenant in tail, before the happening of the event, on which the limitation
over

Lloyd v.
Carew
Show. Ca.
in Parl.
137.

Page v. over is to arise, completely destroys such
 Hayward, limitation.
 Pigot Re-
 cov.

253. Hitherto we have spoken of contingent Uses, arising by the act of *God*, as Mr. *Booth* calls them. We have now to speak of contingent Uses, arising by the act of the party, that is, by the exercise of a power.

Booth's
 Op. Shep.
 Touch.

It has been already observed that an appointment operates under the statute of Uses, not as a conveyance of the land, but as a substitution of a new use, in the place of a former one, and a designation of the person in whom the new use is to vest. Hence where a power is given to a person, to bargain and sell, release or demise, these expressions are so far inaccurate, as they are only applicable to those conveyances, which a party makes as owner of the land, on which they are to operate, and not to those assurances which are made by virtue of, or under a power derived from the statute of uses. Thus where a
 power

power is limited to a person to sell, exchange, grant or demise, the person neither sells, exchanges, grants or demises, but nominates the person in whom the use is to vest; and therefore the party in whose favor the power is exercised is not a vendee, exchangee, grantee or lessee, neither with respect to the donor or donee of the power, nor with respect to the mode in which either the deed creating the power, or the deed by which it is executed operates,

254. These observations shew the nature of appointments under powers, and lead to the point more immediately under consideration; namely, the period within which uses arising upon the execution of powers, may be declared to arise. But here it will first be necessary to make a distinction between a general and a qualified power. By the first is meant a power to create estates generally, without any restraint, either as to their nature, or to the persons in whose favor they are to be exercised.

By

By the latter is meant a power to create estates of a particular description, as for life or years only, or in favor of particular persons, as the children or issue of *A*.

255. Where a general power is given, the party may create any estates under the power which the law would allow him to create, if he had the ownership of the fee, and even to create estates, which could not have been created by the deed in which the power is given.

256. Thus if on a marriage, an estate is limited to a person for life, remainder to his first and other sons, by his then intended wife, successively in tail male; remainder to the use of such persons and for such estates as he shall appoint, and in default of appointment, to several uses in strict settlement; the husband may limit any estates under his power, which he could have limited, if instead of a power of appointment being given to him, the reversion in fee had been left

left in him. Supposing then, his first wife to die, and that he marries a second wife, and has a son by her, he may limit a life estate to that son, with remainder over, in strict settlement, to the sons of that son; yet these last limitations, if inserted in the original settlement, would have been void; it being now settled that limitations to the sons of an unborn son, so as to make them take by purchase are void (a).

257. Where

(a) With respect to the limitation of a life estate to an unborn son, it may not be improper to observe that the current of modern opinions, seems to be in support of it; but this has never been settled by any judicial determination. And it is further from being settled, that even a vested remainder may be limited after it, and therefore a cautious expression is justifiable on this subject, but this sort of guarded expression should not be construed, on this or any other occasion of the like nature, as importing any doubt in the writer himself. Certain it is from Mr. *Booth's* printed opinion in Mr *Baker's* case, (*Cases and Opinions* vol. 2. p. 433.) that the legality of the limitation of a life estate, to an unborn son was doubted so lately as in the Duke of *Marlborough's* case, by some of those able Gentlemen who prepared the respondent's

257. Where the power is qualified as to its objects, there the party is not enabled to do that through the medium of his power, which could not have been done by the deed in which the power is given. Hence, if in the last supposed case, instead of a general power, there had been a power given to the husband to limit the estate to such descendants of his body, and for such estates as he thought proper, this would not have authorised him to limit a life estate to a child born after the execution of the original deed, with remainders over to the children of such child.

Spencer v.
Duke of
Marlbo-
rough.
Dom.
Proc.
1763.

258. *John Duke of Marlborough* devised all his estates to trustees and their heirs, to the use of his daughter *Harriet Countess of Godolphin* for life, remainder to *Lord Ryalton* her eldest son for life, remainder to trustees to preserve contingent remainders, remainder to the

dent's case. It is also remarkable that the legality of such a limitation is not asserted, either in the printed reasons in that case, for the appellant or respondent.

first

first and other sons of Lord *Ryalton* in tail male, remainder to Lord *Robert Spencer* (eldest son of his second daughter *Ann Countess of Sunderland*) for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to *Charles Spencer* (afterwards Duke of *Marlborough*) in the same manner; and inserted a clause in his will, empowering his trustees on the birth of each son of the said Lord *Ryalton*, Lord *Spencer* and *Charles Spencer*, to revoke and make void the respective uses limited to their respective sons in tail male, and in lieu thereof to limit the premises to the use of such sons for their lives, with immediate remainder to the respective sons of such sons severally and respectively in tail mail; and gave his household furniture, gold, plate, &c. in the same manner.

Upon an application to the court of Chancery, by the trustees, for further directions in the carrying the trusts of
the

the will into execution, a question having arisen, touching the power given in the will to revoke the Uses limited to the first and other sons in tail, and to limit the premises to the use of such sons for life only; the Lord Chancellor declared, that the clause of revocation and settlement in the will *as tending to a perpetuity, and repugnant to the estate limited, was void and of no effect.*

On an appeal from this decree to the House of Lords, the following question was put to the Judges—"Whether by
 "the rules of the law an estate tail
 "limited to the use of persons unborn,
 "by any deed or will, can by virtue of
 "any power given by such deed or will,
 "to trustees, be revoked upon the births
 "of such persons, and a new estate limited to such persons for their lives
 "respectively, with remainders to the
 "issue of such persons successively in
 "tail?"

The Lord Chief Justice of the Common Pleas delivered the unanimous
 opinion

opinion of the Judges present upon the said question in the negative. Upon which the decree was affirmed.

259. The principle upon which this case was determined is, that as the law would not have allowed the testator to create estates of this kind by express limitation; so neither would it allow him to do it, through the medium of a power. *Quodcunque prohibetur fieri ex directo, prohibetur et per obliquum.*

On the other hand there is no doubt but, that if instead of the particular power, a general power of appointment had been given to the trustees, they might on the birth of a son, have limited a life estate to him, with remainders over in tail to his children, for if the reversion in fee had been limited to the trustees, they might have done this directly; and therefore such a power would not have enabled them to do any thing indirectly, which having the reversion, they might not have done directly.

*Of result-
ing uses.
Ante f.
178.*

260. It has been stated in a former part of this tract, that where the legal estate in land is transferred by fine, recovery or release, a use may be declared upon these conveyances, without any consideration. But where no use is expressly declared, nor any consideration, or evidence of intent to direct the use ; it has been repeatedly determined, that the use shall result back to the original owner of the estate, for where there is neither consideration nor declaration of uses, or any circumstances to shew the intention of the parties, it cannot be supposed that the estate was intended to be given away.

1 Inst. 23.
a. 271. a.

*Arm-
strong v.
Wolfeley
2 Will.
Rep. 19.*

261. In consequence of this principle, Sir *Edward Coke* has laid it down as a rule “ that so much of the Use, as the owner of the land does not dispose of, “ remains in him.” So that where a person seised in fee, levies a fine or suffers a recovery, without any consideration, or declaration of Uses, the Use results back to himself, and the statute immediately transfers

transfers the legal estate to such resulting Use, by which means he is seised in the same manner as he was before. And if any particular uses are declared, so much of the old Use as is not declared to be vested in some other person, results back to the original owner. Doug. R. 26.

262. Where a person made a feoffment to the use of such person or persons, and for such estate and estates as he should appoint by his will. It was resolved that the use resulted to the feoffor until he had made an appointment. Sir E. Clere's case, 6 Rep. 17.

263. A person made a feoffment to the use of himself, and his intended wife after their marriage. It was determined that the use resulted to the feoffor and his heirs until he married. Wood. lisse v. Drury. Ante f. 230.

264. Where a husband and wife levy a fine of the wife's estate without any consideration or declaration of uses, the 2 Rep. 58. b. Dyer 146. b.

use results back to the wife, and she is seised as before.

Ante f.
199.

265. So where husband and wife joined in levying a fine of the lands of the wife, and made different declarations of the uses of such fine; as both the declarations were void, it was determined that the fine should enure to the use of the wife and her heirs.

Penhay v.
Hurrell,
2 Vern.
370.
2 Freem.
258.

266. A fine was levied to the use of trustees for seven hundred years, remainder to other trustees for three hundred years, and from and after the death of the cognizor, to the use of his son for life, with remainder to the first and other sons of such son in tail. It was resolved by the Lord Keeper, after consideration had with all the Judges, and a case that as the cognizor had had not limited away the freehold to any person during his own life, it resulted back to himself.

Shor-
tridge v.
Lamp-
plugh,
7 Mod.
71. 2 Salk.
677.

267. If a lease and release be pleaded to *A.* and his heirs, and no consideration

tion appears, nor any declaration of the uses to which it is meant to enure. It shall be intended to be to the use of the releasee and his heirs, but if any particular use be declared upon the release, the residue of the use shall result back to the releasor.

268. Where a fine was levied by a tenant for life, remainder-man in tail and reversioner in fee; and a declaration of the uses was made by the tenant for life, and the remainder man in tail only; it was determined by Lord *Mansfield*, that the use of the reversion in fee, resulted to the reversioner.

Roe v.
Popham.
Doug. R.
24.

269. Where the same use is limited to the owner of the estate which would have resulted to him in case no declaration of that use had been made, the declaration is void, and he takes it as a resulting use.

270. *Anthony Mitford* being seised in fee of the estate, in question, in the county

Read and
Morpeth
v. Errington.
Cro.
Eliz 321.

S. C. Moo.
284. by
the name
of Pen-
wick v.
Mitford.

county of *Northumberland*, conveyed the same to the use of his eldest son *Jasper* and *Margaret* his wife, and of the heirs males of the body of *Jasper*, remainder to the use of the right heirs of *Anthony*. It was unanimously resolved, that the use limited to the right heirs of *Anthony*, was the ancient use in him, and was never out of him, and was in him as a reversion to grant or charge, and should descend from him to his heir, as if it had not been mentioned; and that the limitation to his right heirs, was void, being no more than the law vested in him.

*Of uses by
implication*

271. The same rule takes place in all conveyances to uses, which operate without transmutation of possession, as in covenants to stand seised, and bargains and sales where the uses arise out of the estate of the covenantor or bargainor, for in these cases, so much of the use as the covenantor or bargainor does not dispose of, still remains in him as his old

Moore v.
Magrath,
Cowp. R.
9.

old estate, and is usually called a Use by implication.

272. *A.* being seised in fee covenanted ^{Pybus v. Mitford, 1 Vent.} to stand seised to the use of his heirs male begotten, or to be begotten on the body ^{372.} of his second wife. It was determined that *A.* took an estate for life by implication; for the limitation being to the heirs of his body, &c. and it being impossible for him to have any such heirs during his life, (as *nemo est hæres viventis*) the use was undisposed of during his life.

273. It follows from the same prin- ^{1 Rep. 154 a. and b.} ciple, that where a use does not arise, upon a covenant to stand seised, or bargain and sale, either for want of a sufficient consideration, or for any other cause, such use remains in the covenantor.

274. If *A.* covenants that in consider- ^{Idem.} ation of *B.*'s being his son, he shall have his estate for life, and after his death,
in

in consideration of *C.*'s having paid him one hundred pounds, that he shall have it in fee. Here the consideration and grounds of raising these uses are several, and therefore if *B.* refuses, *A.* shall retain the estate, and *C.* shall not take immediately.

Idem.

275. It should however be observed, that this doctrine does not apply to uses raised by a transmutation; for if a person makes a feoffment in fee to the use of *A.* for life, and after to the use of *B.* for life, and after to the use of *C.* in fee, in that case if *B.* refuses, *B.* shall take his estate presently; for the feoffor by his feoffment hath given all his estate out of him, and all the uses are created out of it, as out of one and the same root: and therefore as long as any of the uses can take effect, the feoffor shall have nothing in the land.

276. Where a use is expressly limited to the original owner of the estate, he will not be allowed to take any resulting or implied use.

277. If

277. If a person makes a feoffment Dyer III. b. note. in fee, to the use of himself for life, the fee-simple will remain in the feoffees, for otherwise the feoffor would not have an estate for life according to his intention. But if the use was declared to the feoffor in tail, it would be otherwise, for both the estates might be in him at the same time.

So if *A.* makes a feoffment, to the use Idem. of himself, for forty years, and does not limit any other estate, the fee-simple will remain in the feoffees.

278. One *Savage*, being seised in fee, Adams v. Savage, 2 Salk. conveyed his estate by lease and release, to trustees and their heirs to the use of 679. himself for ninety-nine years, remainder to trustees for twenty-five years, remainder to the heirs male of his own body. It was determined that no use for life resulted to *Savage*, and therefore that the remainder was void.

279. *A.*

Rawley v.
Holland.
2 Ab. Eq.
753.

279. *A.* by marriage settlement, conveyed certain lands to the use of himself for ninety-nine years, if he so long lived, and after to the use of trustees for two hundred years, remainder to the use of the heirs male of his own body, remainder to his own right heirs.—Upon a case referred to the Judges of the court of Common Pleas, from the court of Chancery, they held that no estate of freehold could result to *A.* for his life, by implication, because another estate, *viz.* for ninety-nine years, if he so long lived, was expressly limited to him, which would be inconsistent with a freehold by implication.

Vide Tip-
pin v.
Cofin,
4 Mod.
380.

280. It follows from the nature of resulting uses, and uses by implication, that they can never arise to any person but the original owner of the estate.

Davies v.
Speed,
Show. Ca.
in Parl.
104.

281. Husband and wife levied a fine of the wife's estate to the use of the heirs of the body of the husband by the wife begotten, remainder to the husband in fee.

fee. The court held that no estate for life could result to the husband ; because the estate originally belonged to the wife.

282. Where there is any circumstance to shew the intent of the parties to have been, that the use should not result, it will remain in the feoffees.

283. A recovery was suffered by one *Hummerston*, to the intent that the recoveror should make an estate to him and his wife for their lives, remainder to their eldest son in tail, &c. It was agreed, that after the recovery suffered, the recoverors should be seised to their own use, for if they were seised to the use of *Hummerston*, then they could not make the estate. But *Southcot* and *Wray* said, they ought to do this in convenient time, otherwise the Use would result to the person against whom the recovery was had.

Hummerston's
case,
Dyer 166.
a. note.

284. A feoffment was made by *N.* on condition to convey to *N.* for life, remainder

Win-
nington's
case,
Jenk.
253.

mainder to the eldest son of *N.* in fee. It was resolved, that no Use resulted to *N.* for if so, then the estate would vest by the statute of Uses, and the feoffee could not make an estate to *N.* and his son.

Lord Al- 285. A tenant in tail levied a fine to
tham v. *J. S.* and his heirs, in order to make
Lord An- him tenant to the *præcipe* in a recovery,
glesea, but no use was declared on the fine.
Gilb. R.
16.

Seven years after a writ of entry was brought against *J. S.* who vouched the cognizor of the fine, and a common recovery was thus regularly suffered.—The question was, whether *J. S.* had an estate of freehold in him at the time of the recovery.

It was contended, that although the legal estate passed by the fine to *J. S.* yet as no use was declared, it resulted back to the original owner of the estate; so that *J. S.* had no estate in the lands when the recovery was suffered, and therefore

therefore was not a good tenant to the *præcipe*.

But it was held by Lord Chief Justice *Holt* and all the other Judges, that when a fine was levied, or a feoffment made, to a man and his heirs, the estate was in the cognizee or feoffee, not as an Use, but by the common law, and might be averred to be so; and as in this case the intention of the fine plainly appeared to be, for the purpose of making a tenant to the *præcipe*, the use and estate should be allowed to have vested in J. S. and not to have resulted to the cognizor of the fine. Vide
Douglass
Rep. 25.

286. Where a tenant in tail suffers a recovery of his estate without declaring the uses thereof, it has been doubted whether the use which results to him, is in tail, or in fee. *What use
results to
a tenant in
tail.*

The language of the old books is, that where there is a feoffment, fine or recovery without consideration, and no use is

1. Willf.
R. 19.

is declared, those assurances shall enure to the old Uses.

Latch.
82.

287. In the case of *Argol v. Cheney*, a father, tenant for life, and the son tenant in tail, joined in suffering a common recovery; but the father only executed the deed declaring the Uses. The court directed the jury to find the Uses, according to the estates which the parties had at the time of suffering the recovery.

Palm.
359.

288. In the case of *Waker v. Snow*, a father tenant for life, and a son tenant in tail, suffered a common recovery, without any declaration of Uses. It was held that the recovery should enure to the former Uses.

289. The doctrine laid down in the above cases is liable to great objections, for as resulting uses are guided by the intent of the parties, where a tenant in tail suffers a recovery without any declaration of Uses, the presumption is, that this

this act was done for the purpose of acquiring the absolute dominion over his estate, as it cannot be supposed that he would go to the expence of suffering a recovery, if he is only to acquire the same estate which he had before ; and the determination of Sir *Joseph Jekyll*, in the case of *Nightingale v. Ferrers*, is a direct and positive authority in point to prove that where a tenant in tail suffers a recovery without any declaration of Uses, the resulting Use is to him in fee.

290. In that case it appears, that the estates of which the recovery was suffered, had descended to the only daughter of *Robert* the son, who had joined his father in the recovery, and had not declared any Uses of his estate in remainder. Now if the recovery had enured as to *Robert* the son's estate, to the old uses, he would have been tenant in tail male, with remainder to his brothers in tail male, successively, and upon his death without issue male, the estate would

Ante f. 204.

would have vested in his next brother, and not in his daughter. But it appears to have been so fully admitted by the counsel of the Lord *Ferrers*, who was party to that suit, and who was a younger brother of *Robert* the son, who suffered the recovery, that in case of no declaration of uses, the use and estate resulted to *Robert* the son in fee; that the only point for which they contended was, that the articles executed by *Robert* the son, while an infant, and under which they claimed, amounted to a good declaration of the uses of the recovery.

Ex J. H. A.

F I N I S.